91-29

Supreme Court, U.S.
FILED
JUL 2 1991
OFFICE OF THE CLERK

No. _____

In The

Supreme Court of the United States

October Term, 1990

RAYMON J. MELTON,

Petitioner,

v.

CITY OF OKLAHOMA CITY, et al.,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

APPENDIX TO PETITION

*STEVEN M. ANGEL
LAW OFFICES OF STEVEN M. ANGEL
50 Penn Place, Suite 825
Oklahoma City, OK 73118
(405) 848-0286

CARL D. HUGHES
HUGHES & NELSON
5801 N. Broadway Ext.
Suite 302
Oklahoma City, OK 73118
(405) 848-0111

Attorneys for Petitioners

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

RAYMON J. MELTON, Plaintiff-Appellee/ Cross-Appellant, v. CITY OF OKLAHOMA CITY, a municipal corporation; LLOYD A. GRAMLING, chief of Police for the City of Oklahoma City; GERALD L. EMMETT, Assistant Chief of Police for the City of Oklahoma City; MARVIN MAXWELL, Major, Oklahoma City Police Department; WILLIAM R. CHAMBLESS, Major, Oklahoma City Police Department; CARL SMITH, Lieutenant, Oklahoma City Police Department; ROBERT TAYLOR, Lieutenant, Oklahoma City Police Department; DAVID MCBRIDE, Lieutenant, Oklahoma City Police Department; and PAULA HEARN, Assistant to the City Manager, Defendants-Appellants/ Cross-Appellees.	)	Nos. 85-1738, 85-1739, 85-1740, 85-1741, 85-1742, and 85-1811

OPINION ON REHEARING EN BANC
(Filed March 19, 1991)

Appeal from the United States District Court
For the Western District of Oklahoma
D.C. No. CIV-84-65-E

Steven M. Angel, Oklahoma City, Oklahoma, for Plaintiff-Appellee/Cross-Appellant.

Richard C. Smith (James G. Hamill, Diane Lewis, Gerald S. Rakes, and Jonathan D. Woods, with him on the briefs), Oklahoma City, Oklahoma, for Defendants-Appellants/Cross-Appellees.

Diane Pedicord, Oklahoma City, Oklahoma, on the brief for Amicus Curiae Oklahoma Municipal League, Inc.

HOLLOWAY, Chief Judge,* and **MCKAY, LOGAN, SEYMOUR, MOORE, ANDERSON, TACHA, BALDOCK, BRORBY**, and **EBEL**, Circuit Judges.

MOORE, Circuit Judge.

Plaintiff Raymon J. Melton brought this action under 42 U.S.C. §§ 1983 and 1985. Among the causes he asserted was a claim that he was deprived of a liberty interest by

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*Honorable William J. Holloway, Jr., Chief Judge, heard oral argument but did not participate in the decision of the case.

the defendants without due process when he was discharged from his job as a police officer in Oklahoma City, Oklahoma. Following a plaintiff's verdict, the defendants appealed, and a portion of the judgment was reversed. *Melton v. City of Oklahoma City*, 879 F.2d 706 (10th Cir. 1989). We granted rehearing en banc to resolve certain issues relating to plaintiff's liberty interest claim. *Melton v. City of Oklahoma City*, 888 F.2d 724 (10th Cir. 1989). Although we denominated four issues for argument, we believe disposition of the first moots the remainder. We now conclude the trial court committed plain error in the submission of the liberty interest claim to the jury, and we reverse. The remaining issues decided by the panel stand as determined.

I.

Prior to his termination, Mr. Melton was a lieutenant in the Oklahoma City Police Department. During his tenure, he became a friend of William C. Page, a former state court judge who was indicted by a federal grand jury on felony charges. In preparation for the trial of Mr. Page, the federal prosecutor interviewed Mr. Melton. For reasons of his own, Mr. Melton surreptitiously recorded his conversation with the prosecutor and later gave the recording to counsel for Mr. Page.

The recording was used by Mr. Page's attorney as the basis for a motion to dismiss the indictment on the ground that Mr. Melton had provided the prosecutor with information to which the defense was entitled under *Brady v. State of Maryland*, 373 U.S. 83, 87 (1963). The

motion was denied, and Mr. Page was subsequently convicted.

Following the trial, Agent Ed Enwright, the agent in charge of the Oklahoma City office of the Federal Bureau of Investigation, advised defendant Lloyd A. Gramling, Chief of Police, of a complaint against Mr. Melton. Mr. Enwright accused Mr. Melton of improperly disclosing the details of his conversation with the federal prosecutor and of perjuring himself in an affidavit and during trial.

In response, Chief Gramling ordered a police department investigation of the accusations. On August 1, 1983, defendant Lt. Carl Smith, the head of the Internal Affairs Bureau, commenced the investigation by interviewing Mr. Enwright, who directed Lt. Smith to Agent Ron West. Lt. Smith spoke to Agent West from whom Lt. Smith obtained details of Mr. Melton's tape recorded conversation. Mr. Enwright also told Lt. Smith he did not know the details of the alleged perjury, but Lt. Smith could obtain the facts from a third agent, Mr. Fitzpatrick.

After his interviews of Agents Enwright and West, but before contacting Agent Fitzpatrick, Lt. Smith prepared and delivered to Mr. Melton a document dated August 17, 1983. According to Lt. Smith, the only purpose of the document was to "inform Lt. Melton what he had been accused of by the F.B.I. and that I was conducting, on the instructions of the Chief's office, an investigation of him on those allegations." (R. Vol. XII, 676).[1] Referring

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[1] There is some confusion whether this letter constituted the "charge" which impelled the subsequent departmental

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to those allegations, Lt. Smith wrote Mr. Melton was "accused of violating the Police Code of Ethics[2] . . . [and] making perjured statements both in a sworn affidavit . . . and during testimony . . . during the trial."

When he interviewed Agent Fitzpatrick, Lt. Smith discovered there was no substance to Agent West's claim Mr. Melton had perjured himself. Agent West had told Lt. Smith that Mr. Melton had testified during the Page trial he had turned over to the FBI certain evidence in the Page case that was not pursued by the FBI. Agent West also told Lt. Smith following a search subsequent to Mr. Melton's testimony, no formal record of Mr. Melton's evidence was found by the FBI. Agent West said, therefore, unless Mr. Melton had given the information to Agent Fitzpatrick, Mr. Melton's testimony was untrue. When Lt. Smith interviewed Agent Fitzpatrick, he stated Mr. Melton made several attempts to provide him with information, and if Mr. Melton said he furnished him with the evidence "then he probably did." (Ex. 61, Report dated September 6, 1983, at 2).

Lt. Smith then filed his report of the investigation (Ex. 61) with Chief Gramling on September 6, 1983. The

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disciplinary proceedings. Lt. Smith's testimony negates that notion.

[2] That portion of Section 1.01 of the Oklahoma City Police Department's Operations Manual applicable to the accusation states: "Whatever I see or hear of a confidential nature or that is confided to me in my official capacity will be kept ever secret unless revelation is necessary to the performance of my duty."

report made no recommendations, reached no conclusions, but described the substance of the interviews of various witnesses.

On September 8, 1983, Mr. Melton was notified that five days later a hearing would be convened by a police department disciplinary review board (the Board) to consider the Internal Affairs investigation. On that same day, two stories which are the genesis of the plaintiff's liberty interest claim, appeared in Oklahoma City newspapers.

Prior to the appearance of the stories, a reporter from *The Daily Oklahoman* called defendant Lt. David McBride, the police department's public information officer, seeking confirmation of the pending investigation. (R. V. XII, 604-06). Lt. McBride testified the reporter:

> read me a story that he had about information that he had received by [sic] sources that he did not reveal, that the police department was investigating R. J. Melton.
>
> And he articulated several things that he, through his sources, had learned, that Melton was – well, I think that answers your question. . . .
>
> . . . .
>
> I didn't take notes of his interview. Okay. He was calling to tell me here's what I've got. What's the police department's position on this. The information he had, that Melton Allegedly perjured himself at a – during a trial, the trial of Judge William Page.
>
> He said that he had information that the police department was investigating Melton for tape recording an interview with the federal prosecutor.
>
> . . . .

> And what I tried to do was minimize that as much as possible, tell them that – confirm those things that there was investigation in progress, that to my knowledge there were no immediate charges of a criminal nature being considered.
>
> . . . .
>
> We corrected some information. Some of the information that [the reporter] had was far more damaging, in my mind, than the story that actually ran. It was incredible. I was quite alarmed that some of the information he had was inaccurate and was very damaging to . . . Mr. Melton . . . .

(R. V. XII, 603-06. This conversation and a "follow-up" (R. V. XII, 607) ultimately led to the publication of two stories.

It is undisputed that both stories reported the Internal Affairs investigation of Mr. Melton and the hearing that was set for that day. In addition to statements taken from Lt. McBride, the *Daily Oklahoman* quoted "other knowledgeable sources" who stated Mr. Melton "is being investigated, among other things, for purportedly committing perjury during Page's trial." Nothing within the *Daily Oklahoman* article attributes to Lt. McBride any disclosure of the FBI perjury accusation. Indeed, the bulk of information contained in the story, including that accusation, was attributed to "sources," "informed sources," or "other knowledgeable sources." The article in the *Oklahoma City Times* attributed statements to Michael Gassaway, "one of Page's attorneys," and Lt. McBride. That article stated:

McBride said the department's internal affairs division also investigated allegations Melton perjured himself when he testified in Page's behalf during Page's trial.

. . . .

The internal affairs findings will go before a disciplinary review board at 9 a.m. Tuesday. The board will decide whether Melton's actions violated departmental policies or ethical cannons, McBride said.

He said the board will recommend to Chief Lloyd Gramling what action, if any, he should take against Melton.

. . . .

McBride said the internal affairs investigation did not establish whether Melton perjured himself.

"It's not the responsibility of internal affairs to draw conclusions," McBride said. "It's their responsibility to report the facts as they find them to be from the investigation.

"The investigative report would only reflect, 'Here's what the facts were: here's what Lt. Melton said.' "

McBride said he does not know what specific parts of Melton's testimony are alleged to be perjurious.[3]

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[3] When cross-examined about this quote and why he did not tell the reporter that there was no longer an investigation into the accusation of perjury, Lt. McBride stated: "Well, that's in response to a question posed to me about what part was alleged to have been perjury and I did not know and still don't know." (R. V. XII, 617).

> To report the internal affairs review's findings on the alleged perjury would be to try and convict Melton in the press before the review board has reached a conclusion, he said.[4]

Both stories contain accurate representations of Lt. McBride's responses to the questions of the reporters.

When the Board was convened, the chairperson, defendant Chief Emmett, told the members that the charge of perjury "was out, that we would not consider that under any circumstances. There will be no discussion of that whatsoever." (R. V. VII, 10).[5] At the outset of the hearing, Mr. Melton was told by Chief Emmett the Board would not consider the perjury accusation. (R. V. X, 145). According to plaintiff, "This was the first that I really knew that I was being boarded just for the police Code of Ethics." *Id.*

Following the hearing, the Board, with one member dissenting, concluded Mr. Melton had violated the Code of Ethics by recording and disclosing to Mr. Page's counsel the contents of Mr. Melton's conversation with the

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[4] About this statement Lt. McBride testified: "That was a quote taken out of an overall statement, that was not fair, that should not be reported. And I tried to discourage them from saying anything about that allegation." (R. V. XII, 619).

[5] A member of the Board, Major Maxwell, stated in response to a question whether the Board had a prehearing discussion of the accusation of perjury: "It seems that we did, . . . that we discussed that allegation would not be considered, because there was, you know, it just apparently appeared to be a misunderstanding rather than anything else."

federal prosecutor. Two members of the Board consequently recommended Mr. Melton be demoted, but the remainder recommended discharge. Chief Gramling carried out the recommendation of the majority.

In response to media inquiry, Lt. McBride subsequently confirmed in a published statement that Mr. Melton had been discharged for violating the police Code of Ethics. No media account carried information about the resolution of the FBI's perjury accusation, but on cross-examination, Lt. McBride was asked:

> Q: And you never made it a matter of public record that he was – that the charges were unfounded, sustained, not sustained, he was cleared, whatever the language of those policies are. You never made that a matter of public record, did you, sir?
>
> A: Yes, I did.
>
> Q: You did?
>
> A: Yes, sir.
>
> Q: And who did you tell?
>
> A: To several radio stations also. [sic]
>
> Q: Who?
>
> A: Who?
>
> Q: Tell us.
>
> A: I don't recall everybody.
>
> Q: Just tell us one.
>
> A: Just one? I'm sure that whoever covered that story. And I know KEBC covered it. I don't know who all else covered that story, but there were questions asked about the perjury allegation. And my response was those charges were

> found not to be, not to have happened, that it was a misunderstanding.
>
> I recall specifically talking to several members of the press about that.

(R. V. XII, 621). This testimony was not controverted.

II.

The issue now before us stems from Mr. Melton's argument that the publication of the two stories quoting Lt. McBride and others which revealed the accusations of perjury made by the FBI resulted in the denial of a liberty interest because Mr. Melton was not provided a hearing to clear himself of that accusation.[6] The particular issue

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[6] This is not precisely the issue raised by Mr. Melton in the district court. The liberty interest claim advanced by the plaintiff in his complaint did not distinguish between the accusation of the ethics code violation and the accusation of perjury. Indeed, the second amended complaint merely averred:

> In discharging Plaintiff, Defendant Lloyd Gramling did not provide Plaintiff with a hearing which would meet procedural due process requirements. Furthermore, the basis for said discharge stigmatized Plaintiff and harmed his reputation in the community and amongst his fellow officers.

(R. Vol. 1, Tab 29, 9). Moreover, the plaintiff's ultimate theory pleaded was that the defendants deprived him of rights secured by the Constitution by: "discharging Plaintiff based upon false and stigmatizing charges, thereby depriving Plaintiff of liberty without due process in violation of the Fourteenth Amendment to the Constitution of the United States; . . . " *Id.* at 10. While plaintiff now recognizes that the essence of his claim has to be the denial of a name-clearing

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we granted rehearing to address is whether the district court committed plain error by instructing the jury that a liberty interest may be violated by charges which "would stigmatize the employee's reputation *or* foreclose future employment opportunities." Order Granting Rehearing, 888 F.2d at 724. We now believe that question cannot be answered without first determining whether the two articles upon which the claim is based are stigmatizing.[7]

To place our consideration of the issue in proper perspective, however, we must review the nature of the liberty interest now claimed by Mr. Melton. The seminal issue we shall resolve in this review is whether a plaintiff asserting such a claim must prove both stigmatization *and* loss of prospective employment opportunity.

Relying on language from *Miller v. City of Mission, Kan.*, 705 F.2d 368 (10th Cir. 1983),[8] the district court

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hearing, that was not the claim he presented to the district court. Since that distinction has not been pursued to this point in the case, we shall overlook it.

[7] The dissent characterizes this as a new issue neither briefed nor argued. We, nonetheless, believe the question subsumed within the essential to the issues noted for en banc review.

[8] In that case, we stated:

> " 'The concept of liberty recognizes two particular interests of a public employee: 1) the protection of his good name, reputation, honor and integrity, and 2) his freedom to take advantage of other employment opportunities.' " (citations omitted). The manner in which a public employee is terminated may

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instructed the jury that for plaintiff to prevail on his liberty interest claim he must prove that his termination was accompanied by public dissemination of the "charges" against him, and that "the *reasons for his dismissal* would stigmatize his good name, reputation, honor and integrity, *or* foreclose further employment opportunities."[9] (emphasis added). We now question this instruction on two grounds. First, was it proper to allow the jury to consider the issues of stigmatization and deprivation of employment opportunities in the disjunctive; and, second, did the trial court err by allowing the jury to consider whether the statements relied upon by plaintiff were stigmatizing without an independent review of that issue by the court?[10]

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> deprive him of either or both of these liberty interests. When the termination is accompanied by public dissemination of the reasons for dismissal, and those reasons would stigmatize the employee's reputation *or* foreclose future employment opportunities, due process requires that the employee be provided a hearing at which he may test the validity of the proffered grounds for dismissal.

Miller, 705 F.2d at 373 (citations omitted) (emphasis added).

[9] Defendants now argue the court should not have given *any* instruction on the liberty interest claim, but they failed to object to the giving of the questioned instruction. Indeed, defense counsel did little to aid the trial court in this case.

[10] Because it is undisputed that the FBI's accusation that Mr. Melton perjured himself was not "the reason[ ] for his dismissal," there is an additional question whether this instruction conformed to the evidence. We shall not address that question because it is neither raised in nor a part of the questions for rehearing.

The solution to our questions is contained in a line of cases beginning with *Board of Regents v. Roth*, 408 U.S. 564 (1972). In that case, reviewing the constitutional guarantees of liberty and property in the context of public employment, the Supreme Court elaborated upon the elements of "stigmatization" in charges leading to dismissal, *id.* at 573, and foreclosure of the employee's "freedom to take advantage of other employment opportunities." *Id.* Holding the Regents (State) had not taken action against Mr. Roth that would implicate his liberty interest, the Court stated:

> The State, in declining to rehire the respondent, did not make any charge against him that might seriously damage his standing and associations in his community. It did not base the nonrenewal of his contract on a charge, for example, that he had been guilty of dishonesty, or immorality. Had it done so, this would be a different case. For "[w]here a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential. (citations omitted). In such a case, due process would accord an opportunity to refute the charge . . . .
>
> Similarly, there is no suggestion that the State, in declining to re-employ the respondent, imposed on him a stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities. The State, for example, did not invoke any regulations to bar the respondent from all other public employment in state universities. Had it done so, this, again, would be a different case. For "[t]o be deprived not only of present government employment but of future opportunity for it certainly is no small injury . . . . "

Id. at 573-74 (citations omitted).

In succeeding cases, the Court brought *Roth* into sharper focus. First, in *Paul v. Davis*, 424 U.S. 693, 710 (1976), the court stated *Roth* did not hold that defamation of a public employee alone is enough to violate a protected liberty interest. Additionally, the Court explained, to be actionable, the defamation must occur in the course of the termination of employment. *Id.* Second, the stigmatizing statement must be disclosed publicly. *Bishop v. Wood*, 426 U.S. 341, 348 (1976). Third, the stigmatizing statement must be false. *Codd v. Velger*, 429 U.S. 624 (1977). Indeed, "there must be some factual dispute between an employer and a discharged employee which has some significant bearing on the employee's reputation." *Id.* at 627.

Putting these cases together, we can construct the parameters of a liberty interest case involving the discharge of a public employee. When a public employer takes action to terminate an employee based upon a public statement of unfounded charges of dishonesty or immorality that might seriously damage the employee's standing or associations in the community and foreclose the employee's freedom to take advantage of future employment opportunities, a claim for relief is created. That construction of the claim leads us to the conclusion the trial court erred in instructing the jury on the nature of the liberty interest asserted in this case.[11]

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[11] The employee does not have to prove *actual* denial of a job opportunity. It is sufficient that a plaintiff prove termination based upon a publicized false charge of sufficient opprobrium that would make the plaintiff an unlikely candidate for employment by a future employer. *See, e.g., Green v. St.*

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Because the court disjoined the aspects of stigmatization and foreclosure of opportunity, the jury was permitted to find for the plaintiff on grounds that he was foreclosed from future employment opportunities without also finding he had been stigmatized. As a result, the plaintiff was permitted to recover a substantial verdict without carrying the entire burden of proof placed upon him. We believe the instruction constituted plain error because the dichotomy created in the instruction between stigmatization and future employment opportunity is patently wrong. Moreover, when the improper instruction is coupled with the absence of stigmatization, which we shall discuss in part III, the consequences of the error are simply unjust and prejudicial. The factors of the incorrect instruction and the results produced, working together, create plain error. *Zimmerman v. First Fed. Sav. & Loan Ass'n*, 848 F.2d 1047, 1054 (10th Cir. 1988).

III.

A.

We now turn to the question whether the statements made by Lt. McBride to the *Oklahoma City Times* were stigmatizing. We undertake this determination in accordance with the directives set out in *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485 (1984).

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Louis Housing Auth., 911 F.2d 65, 69 (8th Cir. 1990) (Stigma sufficient if it involves dishonesty, serious felony, manifest racism, serious mental illness, or the like. Such "characteristics imply an inherent or at least a persistent personal condition, which both the general public and a potential future employer are likely to want to avoid.")

Bose involved a claim of commercial disparagement in which the question of whether the defendant made a false statement with actual malice was an issue on appeal. In its review, the Court initially recognized the conflict of two established principles. The first is that the finding of malice is subject to the clearly erroneous test of Fed. R. Civ. P. 52(a). The second, as the Court noted in *New York Times Co. v. Sullivan*, 376 U.S. 254, 284-86 (1964), is that in cases raising First Amendment issues, an appellate court has an obligation to make an independent review of the record to insure against "forbidden" intrusion on free expression. *Bose*, 466 U.S. at 499, 508. While embracing the notion that deference is to be accorded to a trial court's finding of fact, the Court nonetheless stated, when findings are intertwined with legal principles, the appellate court's duty to correct errors in law is not inhibited by Rule 52(a). Indeed, the Court explained:

> A finding of fact in some cases is inseparable from the principles through which it was deduced. At some point, the reasoning by which a fact is "found" crosses the line between application of those ordinary principles of logic and common experience which are ordinarily entrusted to the finder of fact into the realm of a legal rule upon which the reviewing court must exercise its own independent judgment. Where the line is drawn varies according to the nature of the substantive law at issue. Regarding certain largely factual questions in some areas of the law, the stakes – in terms of impact on future cases and future conduct – are too great to entrust them finally to the judgment of the trier of fact.

Id. at 501, n.17.

We believe the question of stigmatization before us must fall into this realm because it implicates many of the Court's concerns over the fact-finding process of the First Amendment. As in *New York Times v. Sullivan* and *Bose*, the finding of stigmatization intersects First Amendment principles and defamation law. Whether Lt. McBride's report of the FBI accusations stigmatized Mr. Melton evokes the same conflict between the common law of defamation and First Amendment principles as the trial court's finding of actual malice and free speech in *Bose*. 466 U.S. at 502-03. We therefore follow the mandate of *Bose* and make an independent review of the record on the dispositive constitutional issue. *Milkovich v. Lorain Journal Co.*, ___ U.S. ___, 110 S. Ct. 2695, 2705 (1990).

The basis for Mr. Melton's claim is the assertion Lt. McBride publicized reports that Mr. Melton perjured himself. Were the facts that simple, the case would have a different focus, but the simplification, in this instance, leads to a distortion which unjustly controls the outcome. To permit the distortion to stand, therefore, is wrong.

There are many controlling factors overlooked in the plaintiff's claim. First, Lt. McBride was not alone responsible for the publication. The evidence is undisputed that the first reporter who contacted him already knew about the FBI's accusations. Unfortunately, the source of that information was not disclosed, but we do know the original disclosure of the accusation did not come from Lt. McBride.[12] Second, the published stories themselves

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[12] The significance of this fact is underscored by *Codd*. There, in describing the name-clearing hearing mandated by

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attribute disclosure of the defamatory reports to persons other than Lt. McBride. More importantly, the disclosure of the perjury accusation contained in *The Daily Oklahoman* story came in quotes from the spectral informants, *not* from Lt. McBride. Third, all the statements made by Lt. McBride were *true*. Mr. Melton *was* accused by the FBI of having committed perjury, and the Oklahoma City Police Department *was* investigating that accusation. Fairly read in context, there is nothing contained in either publication which suggests Lt. McBride or any other defendant either accepted the accusation as true or embraced it as his own.

Fourth, the plaintiff was never *charged* with perjury by the Chief of Police, and the punitive action taken against Mr. Melton had nothing to do with the FBI's accusation. Indeed, even before the punitive action against him went beyond the initial investigative stage, the defendants had decided the accusation was without substance. In fact, the issue of the perjury accusation would not have arisen at all during the disciplinary process without the disclosures made by those "other

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Roth, the Court stated: "*Only if the employer creates* and disseminates a false and defamatory impression about the employee in connection with his termination is such a hearing required." 429 U.S. at 628 (citations omitted) (emphasis added). It is impossible, in this case, to say the employer *created* the false and defamatory impression when the original disclosure came from unidentified sources. If there is a "bottom line," as suggested by the dissent, it is *Codd's* use of the conjunctive requiring the employer to "create and disseminate[ ]" the false impression. The dissent is willing to overlook that pregnant conjunctive.

sources" to the press. Moreover, Mr. Melton was never, and could never have been, called upon to defend himself against the FBI's accusation because that accusation was not an issue. Indeed, Mr. Melton admitted he knew at the hearing he was only charged with violation of the Code of Ethics.

Of the circumstances obscured in plaintiff's claim, two are most critical. First, the statements attributed to Lt. McBride and published in the Oklahoma City press are deprived of any stigmatization by *Codd* because nothing Lt. McBride reported was false. Moreover, even though Lt. McBride reported the unfounded accusations of the FBI, there is no evidence that he did so maliciously, recklessly, or with any harmful intent. Neither is there any evidence that he adopted those accusations as his own or as those of the Oklahoma City Police Department. Second, the defendants did not "charge" Mr. Melton with having perjured himself.[13]

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[13] The dissent contends it is significant that the police department failed to follow its own operating manual and make a formal determination of the FBI accusation. In the context of this case, that technical default really has no significance. It is undisputed that the department *in fact* made a determination that the accusation was groundless, and that determination was made before the hearing was held. It cannot be contended under these circumstances that the false accusation had any bearing on the disciplinary process. More importantly, as we have already noted, *Codd's* requirement of a factual dispute between the employer and employee (see p. 14, *supra*) cannot be satisfied when both parties are in agreement that the false accusation is indeed false.

B.

Codd does not establish a hardbound rule that truth is a complete defense to every liberty interest claim of the nature asserted by Mr. Melton. Yet, we believe, in instances such as this case, where there is no evidence of duplicity behind truthful reports, *Codd* exonerates the person making the report.[14] To determine whether a report is truthful, however, the court must view a publication in its entirety. We reach this conclusion from the direction taken by the Supreme Court in cases involving the conflict between the right of free speech and charges of defamation. In *Milkovich*, 110 S. Ct. 2695, the Court's own review of those cases led the Court to strongly imply

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[14] We have also held that falsity is an element of public employee's liberty interest claim. *Rich v. Secretary of the Army*, 735 F.2d 1220, 1227 (10th Cir. 1984) (quoting *Asbill v. Housing Auth. of Choctaw Nation*, 726 F.2d 1499, 1501 (10th Cir. 1984)); *see also Derstein v. State of Kan.*, 915 F.2d 1410, 1414 (10th Cir. 1990).

Looking for parallels in state common law, we find that the literal truth of a report is a bar to a defamation action. *Bahr v. Ettinger*, 745 P.2d 807, 808 (Or. App. 1987); *Rosales v. City of Eloy*, 593 P.2d 688, 690 (Ariz. App. 1979). Some courts, however, have recognized that a literally true statement, when considered in context, can lead to false impressions which create liability for defamation. The distinction between those reports which are actionable and those which are not is what the reporter intends and what the average reader perceives from the report. *See Lyons v. Rhode Island Publishing Employees Council 94*, 516 A.2d 1339, 1343-45 (R.I. 1986). Thus, one who reports a fact with the intent that it be understood as defaming may be guilty of stigmatization that would support a liberty interest claim. *See Martin v. Wilson Pub. Co.*, 497 A.2d 322 (R.I. 1985). That, however, is not the evidence in this case.

that whether a publication is defaming is not to be determined from a single sentence, but rather from the content of a complete statement. In *Milkovich*, the plaintiff brought a state court action for defamation contending an article authored by the defendant contained a false accusation that plaintiff had committed an act of perjury. Analyzing the publication, the Court stated:

> The dispositive question in the present case then becomes whether or not a reasonable factfinder could conclude that the statements in the [publication] imply an assertion that petitioner Milkovich perjured himself in a judicial proceeding. We think this question must be answered in the affirmative. As the Ohio Supreme Court itself observed, "the clear impact in some nine sentences and a caption is that [Milkovich] 'lied at the hearing after . . . having given his solemn oath to tell the truth.' " (citation omitted). This is not the sort of loose, figurative or hyperbolic language which would negate the impression that the writer was seriously maintaining petitioner committed the crime of perjury. Nor does the general tenor of the article negate this impression.

Id. at 2707. We believe this analysis requires us to view the sentence in the *Oklahoma City Times* in which Lt. McBride reported the FBI accusation in the context of the entire article. When we do this, we perceive that Lt. McBride neither accepted the FBI accusation as true, nor did he, himself, accuse Mr. Melton of perjury. Nor can it be presumed a reasonable reader would believe from the content of the article that either Lt. McBride or the other defendants had accused Mr. Melton of perjury. Furthermore, because the only disclosures contained in the article in *The Daily Oklahoman* which refer to the perjury

accusations are attributed to "other knowledgeable sources" and not Lt. McBride, a fair reading of *that* article in no way implicates any of the defendants with the so-called stigmatizing statements.[15]

C.

Of equal importance is the fact that Mr. Melton was not "charged" by the defendants with conduct which implicated his morality, honesty, or integrity. Plaintiff contends that the mere reporting of the FBI accusation constituted an actionable "charge," but we do not agree.

We believe a distinction must be drawn between the mere reporting of a claim made by someone and the adoption of that claim as a basis for punitive action against a public employee. We also believe the Supreme Court's use of the word "charge" in those cases from which the liberty interest claim has evolved is neither inadvertent nor insignificant.

Indeed, the genesis of the liberty interest claim is action taken by a public employer against a public employee. In *Owen v. City of Independence, Mo.*, 445 U.S. 622, 634 n.13 (1980), the Court, commenting upon *Roth*, stated:

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[15] The dissent appears to be willing to assume the public in Oklahoma City notwithstanding would have believed to the contrary. This assumption seems based upon the testimony of one police officer that the "law enforcement community" believed Mr. Melton was discharged for perjury. There is nothing in the evidence, however, to suggest any public perception of that result.

> [W]e explained that the dismissal of a government employee accompanied by a "charge against him that might seriously damage his standing and associations in his community" would qualify as something "the government is doing to him," so as to trigger the due process right to a hearing at which the employee could refute the charges and publicly clear his name.

This explanation makes clear that a "charge" is simply another way of referring to "something the government is doing [to the public employee]." The reverse of this construct is that if the government does nothing to the employee, the employee has no grounds for a liberty interest claim. For that reason, the Court concluded stigmatization without a punitive action against a public employee will not violate a protected liberty interest. *Paul v. Davis*, 424 U.S. at 710. Thus, we conclude that to qualify as a "charge" within the context of *Roth*, a stigmatizing statement must be the basis of punitive action taken by a public entity against one of its employees.

Because the defendants in this case took no action against Mr. Melton that was even impliedly the product of the false accusation of perjury, there was no "charge" of perjury made by the defendants. Neither was there an issue involved in the disciplinary process that would have permitted Mr. Melton a vehicle to clear his name of that accusation. Without such an issue, *Codd* implies the liberty interest name-clearing hearing is not required. There, the Court stated:

> [I]f the hearing mandated by the Due Process Clause is to serve any useful purpose, there must be some factual dispute between an employer and a discharged employee which has

> some significant bearing on the employee's reputation.

429 U.S. 627. In this case, there was no factual dispute between Mr. Melton and the defendants over the question of perjury. Indeed, the evidence is quite clear the defendants concluded at an early stage of the proceeding that the accusation arose from a "misunderstanding." It is a simple fact that the FBI accusation was neither considered relevant by the defendants in their decision to discipline Mr. Melton, nor a reason for his dismissal.

As we noted in *Miller*, "[w]hen the termination [of a public employee] is accompanied by public dissemination of the reasons for dismissal, and those reasons would stigmatize" the employee, the concept of liberty is implicated. 705 F.2d at 373. Without either a factual dispute over the accusations or an adoption of those accusations as "the reasons for dismissal," a name-clearing hearing would have been without significance.

We must, therefore, conclude that the mere reporting of the defamatory accusations of a third party will not make governmental agencies or governmental officials liable for the deprivation of a protected liberty interest. That conclusion does not hold, however, if the governmental entity overtly or impliedly adopts those defamatory accusations as the basis for punitive action against an employee.

We made this conclusion plain in *McGhee v. Draper*, 564 F.2d 902 (10th Cir. 1977). In that case, a teacher was not retained by the school board. Prior to the board's decision, however, the teacher had been made the subject of public accusations of allegedly immoral conduct.

Those accusations were aired at a public hearing of the board and were the subject of comments by a board member. Unfortunately, those accusations were unfounded. Following the hearing, without explanation, the board decided not to renew the teacher's contract. There being no evidence that the board eschewed the unfounded accusations, it is clearly inferable that a significant reason for its decision was the board's adoption of the accusation of the teacher was guilty of immoral conduct.[16] We therefore held the evidence supported a

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[16] The dissent minimizes our distinction of this case from *McGhee*, brushing aside our analysis as "Tweedledee and Tweedledum." However, the factual distinctions cannot be so easily ignored. Those distinctions are found in these factual recitations from *McGhee*:

> In November, 1973, [plaintiff] was called to a board meeting where several persons made some accusations against her. One man called her a "sexpot" and said she taught sex in the classroom; his wife made similar comments and said she was unfit to teach students; another couple said she was immoral, her conduct was not fit and that she was unfit to teach students; another man called her a liar.

McGhee, 564 F.2d at 906.

> On April 3 Superintendent Draper asked plaintiff to come to a board meeting that night. When she arrived students were being interviewed by the board, . . . Plaintiff went in last. Mr. Draper asked her if the book, "The Angel Inside Went Sour," was hers. [The book allegedly contained pornographic material.] She said it was not, that she had not seen it, and had not put it in the classroom. Mr. Draper replied that they had affidavits stating that David Hendren checked it out of her classroom.

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claim for deprivation of a protected liberty interest. In this case, however, the evidence is completely contrary to

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. . . .

> On April 5 the board met again without any notice or request that plaintiff appear. The minutes of that meeting state that a resolution was passed unanimously that plaintiff's contract be discontinued as of June 30, 1974, . . .
>
> . . . .
>
> Thus, the letter and minutes from the board made no specific charges or findings against plaintiff. However, the minutes of the meeting on April 2 noted the appearance of a large group of protesting patrons, students statements about the book, . . . the discussions on April 3 by Superintendent Draper with four students about the book matter, . . .

Id. at 907.

> At the May 6 hearing, plaintiff's attorney inquired whether the book was the reason for plaintiff's discharge. Mr. Draper replied they would have 75 people the next night if the board "rescinded itself" and that they had to work with public opinion. Plaintiff's counsel asked defendant Billups [a board member] if he knew anything about plaintiff's moral character, and Billups replied he knew enough to make him "sick."
>
> . . . .
>
> There was a statement by Superintendent Draper that he recommended that the Board reverse itself "because of the book," and that he was convinced that one book had been sold by plaintiff, which a teacher should not be selling. There were

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the inference that the unfounded accusations played any part in Mr. Melton's discipline. Additionally, in *McGhee*, there is no dispute that the employer disseminated the defamatory accusations. We said, "The Superintendent said about 200 copies of the minutes [containing the accusations] were duplicated and that 'we put them out to the public.' " *McGhee*, 564 F.2d at 910. Despite the notions of the dissent, *McGhee* is so factually distinguishable from this case that it is inapposite.

In structuring the parameters of constitutional guarantees, we must be mindful that our zeal for the protection of individual rights does not lead us to absurd conclusions. To hold here that the defendants were required to provide Mr. Melton with a hearing to clear his name from accusations neither made nor adopted by these defendants, or as seemingly suggested by the dissent, a name-clearing news conference, would be just such an absurdity.

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> some responses by board members suggesting moral improprieties, but there was no charge or finding identified as the basis of the board's actions.

Id. at 908 (footnotes omitted).

> It is true that the board's letters and resolutions stated no charges or findings. Nevertheless, the board's minutes focused attention on the allegedly pornographic materials . . . and affidavits held by the board charged misconduct with male students and drunkenness, all of which plaintiff denied.

Id. at 910.

That portion of the judgment of the district court entered in favor of plaintiff on his liberty interest claim is VACATED. The case is REMANDED with instruction to enter judgment for the defendants on that claim.

Nos. 85-1738, -1739, -1740, -1741, -1742, -1811, MELTON v. CITY OF OKLAHOMA CITY, et al.

LOGAN, Circuit Judge, with whom MCKAY and SEYMOUR, Circuit Judges, join, dissenting:

This court granted en banc review limited to four issues which arise in liberty interest claims in an employment context, as follows:

> "(1) Whether the district court committed plain error in instructing the jury that a liberty interest may be violated by charges which 'would stigmatize the employee's reputation *or* foreclose future employment opportunities'?
>
> (2) Whether the district court committed plain error in failing to instruct the jury that before a liberty interest may be infringed, the charges must be found to be false?
>
> (3) Whether the plaintiff was entitled to a name-clearing hearing complete with the right to confront and cross-examine witnesses before the disciplinary review board, assuming dissemination of the perjury charges deprived plaintiff of a liberty interest?
>
> (4) Further assuming plaintiff is entitled to some sort of a hearing, need it be pre-termination, or would some post-termination hearing or name-clearing opportunity be adequate?"

Melton v. City of Oklahoma City, 888 F.2d 724, 725 (10th Cir. 1989). We intended to clear up confusion arising out of our prior decisions for the benefit of the district courts

and future panels of this court. The majority opinion, however, reverses the panel opinion and the judgment below on the basis of an issue never discussed in either the majority or the dissenting panel opinion, *see Melton v. City of Oklahoma City*, 879 F.2d 706 (10th Cir. 1989), or briefed or argued in the en banc rehearing.

The majority perceives an injustice to the defendants and is determined to remedy that injustice, despite the fact doing so prevents the en banc court from reaching many of the problems it intended to resolve. Folklore has it that one of the ancients on our court once declared, "When this court starts out to do justice, all Hell can't stop it!" I wish I could agree that the majority does justice in the case before us.

I

A

Insofar as the court determines that the "stigmatization-*or*-foreclosure-of-future-employment" instruction was erroneous, I agree. Although the majority uses "and" in its statement of the proper rule, the opinion does not hold that the terminated employee must prove both stigmatization *and* foreclosure of future employment. I would give the district courts more guidance on this issue, however, than does the majority.

Parsing the relevant statements in the United States Supreme Court cases I am satisfied that "stigmatization" sufficient to warrant recovery occurs when a charge might "seriously" damage the discharged employee's community standing and associations – *e.g.*, dishonesty or

immorality. *Board of Regents v. Roth*, 408 U.S. 564, 573 (1972). While *Roth* also mentions charges that put the employee's "good name, reputation, honor, or integrity" at stake, *id.*, clearly it is speaking in terms of high level stigma that might affect future employment opportunities. *See Paul v. Davis*, 424 U.S. 693, 697 (1976); *Bishop v. Wood*, 426 U.S. 341, 348 (1976); *Codd v. Vegler*, 429 U.S. 624, 630 (Brennan, J., dissenting) (1977), *id.* at 633, 637-38 (Stevens, J., dissenting); *Owen v. City of Independence*, 445 U.S. 622, 661-62 (Powell, J., dissenting) (1980) (the pivotal question after *Roth* is whether the charges "so blackened the employee's name as to impair his liberty interest in his professional reputation."). Charges are not stigmatizing enough to rise to a constitutionally protected liberty interest unless they involve allegations of dishonesty, immorality, or unprofessional or illegal conduct of the type that would be expected to seriously diminish employment opportunities. Charges of poor job performance, negligence, tardiness, or even insubordination, would not rise to the level of a violation of a protected liberty interest.[1]

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[1] Most of the Tenth Circuit decisions related to employment are consistent with this analysis: *See Conaway v. Smith*, 853 F.2d 789, 794 (10th Cir. 1988) (charges of neglect of duties and insubordination not stigmatizing); *Sullivan v. Stork*, 808 F.2d 737, 739 (10th Cir. 1987) (charges of being negligent or derelict in performing duties not stigmatizing); *Ewers v. Board of County Comm'rs*, 802 F.2d 1242, 1249 (10th Cir. 1986), *cert. denied*, 484 U.S. 1008 (1988), *reh'd on other grounds*, 874 F.2d 736 (10th Cir. 1989) (charges that the employee "padded the books" and "dragged out" cooperative jobs stigmatizing); *Bailey v. Kirk*, 777 F.2d 567, 580 (10th Cir. 1985) (accusation of misappropriation of police property sufficiently stigmatizing); *Sipes*

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I believe a fair implication from the Supreme Court decisions is that the discharged employee does not have

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v. United States, 744 F.2d 1418, 1422 (10th Cir. 1984) (charges of "being tardy, failing to schedule leave (noted as 'lack of reliance'), and for engaging in 'horseplay' " not stigmatizing); *Walker v. United States*, 744 F.2d 67, 69 (10th Cir. 1984) (per curiam) (charges that employee lied on employment form stigmatizing); *Lentsch v. Marshall*, 741 F.2d 301, 304 (10th Cir. 1984) (charges of dishonesty stigmatizing); *Martin v. Unified School Dist. No. 434*, 728 F.2d 453, 455-56 (10th Cir. 1984) (statement that plaintiff's contract was not renewed based "on occurrences this year and continuance of previous concerns" not stigmatizing); *Asbill v. Housing Authority of Choctaw Nation*, 726 F.2d 1499, 1503 (10th Cir. 1984) (charge that employee challenged authority of new agency director not stigmatizing); *Stritzl v. United States Postal Service*, 602 F.2d 249, 252 (10th Cir. 1979) (charges of slow work with poor work habits and low productivity not stigmatizing); *but see Garcia v. Board of Educ. of Sacorro Consol. School Dist.*, 777 F.2d 1403, 1419-20 (10th Cir. 1985), *cert. denied*, 478 U.S. 814 (1986) (claims that plaintiff caused low staff morale and that he was difficult to work with stigmatizing); *Miller v. City of Mission*, 705 F.2d 368, 373 (10th Cir. 1983) (charges that police department "morale was very low, the officers do not respect the Chief and Assistant Chief. The department had deteriorated to an extend [sic] that the men felt that they could not work effectively with the Chief and Assistant Chief" stigmatizing).

Most other circuit decisions are also consistent with this view of the law. The Ninth Circuit adheres to a "moral turpitude" standard. *Kraft v. Jacka*, 872 F.2d 862, 870 (9th Cir. 1989) ("The statements at issue must involve charges which rise to the level of 'moral turpitude;' 'charges that do not reach this level of severity do not infringe constitutional liberty interests.' ") (quoting *Bollow v. Federal Reserve Bank of San Francisco*, 650 F.2d 1093, 1101 (9th Cir. 1981), *cert. denied*, 455 U.S. 948 (1982)). *See also Finkelstein v. Bergma*, 881 F.2d 702, 704 (9th Cir.

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to prove that he tried and was unable to get a job. I would overrule *Conaway v. Smith*, 853 F.2d 789, 794 (10th Cir.

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1989) (charges that plaintiff gained access to confidential personnel files in an unauthorized, underhanded, and perhaps illegal manner held stigmatizing). The Fifth Circuit has at times used the "badge of infamy" standard. *See Evans v. City of Dallas*, 861 F.2d 846, 851 (5th Cir. 1988); *see generally Rosenstein v. City of Dallas*, 876 F.2d 392, 395 n.2 (5th Cir. 1989), *opinion reinstated in part*, 901 F.2d 61 (5th Cir.) (en banc), *cert. denied*, 111 S. Ct. 153 (1990). *See also Green v. St. Louis Housing Authority*, 911 F.2d 65, 70 (8th Cir. 1990) (charges of unsatisfactory job performance insufficient); *Hannon v. Turnage*, 892 F.2d 653, 660 (7th Cir. 1990), *cert. denied*, 111 S. Ct. 69 (1990) (statements that plaintiff was no longer employed in connection with licensing problems at the VA hospital insufficient); *Chabel v. Reagan*, 841 F.2d 1216, 1223 (3d Cir. 1988) (charge that employee acted "on his belief that he was duty-bound to follow the directives of the judges of his district rather than the contrary order of his superior in Washington" not stigmatizing); *Brandt v. Board of Cooperative Educational Services*, 820 F.2d 41, 44-45 (2d Cir. 1987) (charges of sexual misconduct stigmatizing); *Harrison v. Bowen*, 815 F.2d 1505, 1518 (D.C. Cir. 1987) (false charge of unsatisfactory job performance insufficient); *Doe v. United States Dep't of Justice*, 753 F.2d 1092, 1110 (D.C. Cir. 1985) (charges of unprofessional conduct and dishonesty stigmatizing); *Hadley v. County of Du Page*, 715 F.2d 1238, 1245 (7th Cir. 1983), *cert. denied*, 465 U.S. 1006 (1984) (charges of mismanagement not stigmatizing); *Blair v. Board of Regents*, 496 F.2d 322, 324 (6th Cir. 1974) (dismissal for failure to meet minimum standards not stigmatizing). *But see Doe v. Chaney*, 885 F.2d 898, 909-10 (D.C. Cir. 1989) (charge that employee was a security risk not stigmatizing); *Huntley v. Community School Bd. of Brooklyn*, 543 F.2d 979, 985 (2d Cir. 1976) (charges of poor and ineffective leadership stigmatizing), *cert. denied*, 430 U.S. 929 (1977); *Greenhill v. Bailey*, 519 F.2d 5, 8 (8th Cir. 1975) (charges plaintiff was dismissed for lack of intellectual ability stigmatizing);

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1988); *Ewers v. Board of County Comm'rs*, 802 F.2d 1242, 1249 (10th Cir. 1986), *cert. denied*, 484 U.S. 1008 (1988), *reh'd on other grounds*, 874 F.2d 736 (10th Cir. 1989); *Sipes v. United States*, 744 F.2d 1418, 1422 (10th Cir. 1984), and any other of our cases to the extent they may be read to impose a requirement that a plaintiff must recite an actual frustrated job search to warrant relief. The *Roth* dicta indicates that if an *employer* invoked a rule prohibiting a discharged employee's employment by any state institution or participated in a "blackball" practice with other employers, this would constitute an alternative ground for relief.

B

In cases with undisputed facts, I agree with the majority that the court must decide whether the statements made were sufficiently stigmatizing to implicate a liberty interest. Supreme Court decisions appear to treat the question whether the statements were sufficiently stigmatizing to violate a liberty interest as an issue of law for the court to determine. This approach seems implicit in the *Roth* Court's statement that mere nonretention of a nontenured professor does not amount to a deprivation of liberty, although it no doubt would foreclose some employment opportunities. 408 U.S. at 574 n.13. *See also*

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Adams v. Walker, 492 F.2d 1003, 1008 (7th Cir. 1974) (charges of incompetence, neglect of duty and malfeasance in office not stigmatizing); *Jeffries v. Turkey Run Consol. School Dist.*, 492 F.2d 1, 2-3 (7th Cir. 1974) (dismissal for highly unethical conduct not stigmatizing).

Bishop, 426 U.S. at 347-48. In *Codd* the Court appeared ready to decide for itself whether a report was stigmatizing, had it been alleged to have been false. 429 U.S. at 626. *See also Owen,* 445 U.S. at 633 n.13. In most of the lower court decisions I have examined the courts have determined for themselves whether allegedly false charges rose to the level of a "liberty" interest; and when reviewing a decision in which a jury found a liberty interest was violated the appellate courts have given no apparent deference to the jury's determination on this issue.

Thus, I agree that the district court erroneously held that the allegedly false charges arose to the liberty interest level if they stigmatized the employee's reputation "or" foreclosed future employment opportunities. The first half of the instruction is a correct statement of the law, but the second half as written would permit recovery for foreclosure of future employment opportunities without establishing stigmatization. Unless the employer is somehow engaged in blackballing the employee, foreclosure of employment opportunity without proof of stigmatization is not actionable. Because the relevant facts in the instant case were undisputed, and only the inferences and legal conclusions to be drawn from those facts were in issue, I agree with the majority that the court also erred in submitting the stigmatization issue to the jury. Unlike the majority, however, I would find the error was harmless because the jury found for Melton and the district court, had it determined the issue as a matter of law, should have concluded that defendants were sufficiently responsible for dissemination of stigmatizing charges to support Melton's claim for damages.

The majority's bottom line is that defendants merely responded to information dug up by the media, that they did not make untrue statements – "Melton *was* accused by the FBI of having committed perjury, and the Oklahoma City Police Department *was* investigating," slip op. at 17; and the punitive action against Melton "had nothing to do with the FBI's accusation." *Id.* I believe this is too simplistic.

The majority states some facts differently and omits others that I think are relevant and important to our resolution of this issue. The letter Lt. Carl Smith gave Melton concerning the investigation he was conducting for the Oklahoma City Police Department stated, "You are . . . accused of making perjured statements both in a sworn affidavit on a motion to dismiss filed by defense counsel, and during testimony you gave from the witness stand during the trial." Pl. exh. 48. The police department operations manual number 9.01 states expressly that complaints of misconduct by a police department employee, "whether from a private citizen or from another employee, will be fully investigated and the results reported to both the complainant and the accused employee." Pl. exh. 53. When the investigation is complete, that manual requires a finding of one of four designations: "unfounded," "exonerated," "not sustained," or "sustained." *Id.* Melton was interviewed and a full investigation was made, with a formal written report by Lt. Smith delivered to the internal affairs unit. The Disciplinary Review Board considered the report; the perjury issue was on its hearing agenda. The Board recommended Melton's termination but made no finding with respect to the perjury charge. *See* Pl. exh. 61. Melton was never

given an opportunity before the board to address the perjury charges.

Quoting "knowledgeable sources," the *Daily Oklahoman* published an article on September 8 stating that Melton was "being investigated, among other things, for purportedly committing perjury during Page's trial." Pl. exh. 49. Although this article focused primarily on the fact that Melton had given a tape recording of his conversation with a prosecutor to defense counsel for Judge Page, it mentioned that "[p]rosecutors attempted to prove that Melton regularly shared confidential investigative information with Page, who then allegedly shared the information with underworld figures." *Id.* In its recital of the *Oklahoma City Times* article of an interview with Lt. David McBride, which discussed the police department's internal investigation of Melton, the majority opinion leaves out the following:

> "McBride said it was unusual for the internal affairs division to investigate the perjury allegation.
>
> 'Normally, alleged criminal violations don't go through the internal affairs division,' he said. 'But since there already was an internal affairs investigation about specific policy violations, the federal prosecutors chose to go ahead and let us do that.' "

Pl. exh. 50.

The following day the *Times* had an editorial commending the police administration for investigating Melton and another officer who testified on behalf of Judge Page. It recited that the other officer had resigned while under investigation for "allegedly fraternizing with

known criminals." Pl. exh. 52. It then stated, "Melton, a 20-year police veteran, is being investigated for possible violations of police conduct guidelines stemming from an active role in helping prepare Page's defense." *Id.* After Melton was fired, the *Sunday Oklahoman* carried an article on officers who had been dismissed from the Oklahoma City police force "who have been suspected of or found guilty in some wrongdoing. . . . " Pl. exh. 62, X R. 279-80. The article mentioned only that Melton had been terminated for violating the police department's code of ethics. There was direct testimony, however, that the law enforcement community believed that Melton was discharged for perjury as well as cooperation with Page's defense counsel. *See* X R. 227 (testimony of Larry Van Shuyver).

There is no magic in the *source* of stigmatizing charges if the employer either adopts them or furthers their stigmatizing effect. No doubt quite often they originate with others such as the FBI, or even in rumors and gossip. *See, e.g., Eames v. City of Logan*, 762 F.2d 83, 84 (10th Cir. 1985) ("rumors of criminal misconduct"); *McGhee v. Draper*, 564 F.2d 902, 904 (10th Cir. 1977) (*McGhee I*) ("rumors and gossip in the community"); *Lyons v. Barrett*, 851 F.2d 406, 408 (D.C. Cir. 1988) (another employee's accusations of sexual misconduct and misuse of government telephones). In each of the cases cited immediately above the liberty interest became an issue because of public knowledge of the allegations, and because the employer investigated the charges and then discharged the employee; in none of them did the employer give as a reason for discharge that it found the charges to be true. Rather, the employer gave either no

reason or a different reason for the employee's termination. Nevertheless, the confluence of stigmatizing rumors or accusations in public circulation, combined with investigation and discharge created a public impression that the discharge was related to the charges. Accordingly, the employer was held to have a duty to give a name clearing hearing. This circuit recognized in *McGhee v. Draper*, 639 F.2d 639 (10th Cir. 1981) (*McGhee II*), that the employer need not explicitly state stigmatizing factors, but may "implicitly ratify some other stigmatizing allegations. Thus, the dismissal will either cause or *contribute to* the alleged defamation." *Id.* at 643 (emphasis added). *See also Wulf v. City of Wichita*, 883 F.2d 842, 869 n.35 (10th Cir. 1989).

The reasoning of other courts confirms that a liberty interest violation may occur although an employer's tendered reasons for dismissing an employee do not include an explicit accusation of any wrongdoing. It is enough that the employer's actions create an impression that is stigmatizing. For example, in *Fraternal Order of Police v. Tucker*, 868 F.2d 74 (3d Cir. 1989), the Third Circuit stated:

> "When a police department announces to the media that it has information sufficient to occasion an investigation of on-duty drug use, that in this context the officer under investigation refused urinalysis, and that the Department considered the overall situation such as to warrant dismissal, other law enforcement agencies are unlikely to consider the officer for other employment because, at least without more information than that reported, they will conclude that the officer is more likely than not guilty as charged. Accordingly, if the plaintiffs had alleged and proved in this case that they

> had not used drugs behind the Cobb Creek Park tennis courts or that they had substantial evidence to tender at a hearing in support of such an allegation, they, at least arguably, would have made out a stigmatization case under the Due Process Clause."

Id. at 83. Similarly, in *Rodriguez de Quinonez v. Perez*, 596 F.2d 486 (1st Cir.), *cert. denied*, 444 U.S. 840 (1979), the First Circuit stated:

> "Clearly, furthermore, there was serious 'stigma' here. The very act of removal under this statute necessarily brings into question the directors' integrity. The statutory grounds for removal, phrased in the conjunctive, require a determination by the Secretary that 'there is evidence . . . that such [statutorily enumerated] violation or failure is one involving personal dishonesty.'
>
> It is true that, strictly read, the statute does not require an official determination or charge of dishonesty, but only a finding that there is sufficient 'evidence' of dishonesty to warrant invoking the statute. This superfine distinction would have little practical effect, however, in reducing the clear imputation of dishonesty flowing from removal under this statute. We thus think that removal [under the statute] affects a liberty interest requiring due process safeguards."

Id. at 489-90 (footnote omitted). Finally, in *Cox v. Northern Virginia Transp. Comm'n*, 551 F.2d 555 (4th Cir. 1976), the Fourth Circuit stated:

> "The commission defends on the ground that there is no proof that its officers expressly told reporters that Mrs. Cox was dishonest or immoral. It says that, instead, the reporters were told that she was incompetent and failed to establish good relations with the staff.

> These comments, however, did not dispel the effect of the commissioners' published statements linking Mrs. Cox's discharge to the investigation of financial irregularities. Nor did the absence of formal charges of wrongdoing lessen the injury to her reputation that was caused by the interviews the commissioners granted the press. The opportunity of a discharged public employee to get a new job may be hampered as badly by official leaks to the press insinuating dishonesty as by a published official reprimand. In either event, therefore, the employee is entitled to a hearing."

Id. at 558.

The majority says *McGhee I*, our own decision, is distinguishable. But to me it seems as like the case before us now as Tweedledee and Tweedledum. In *McGhee I* allegations of improper behavior by a nontenured teacher did not originate with the school board which fired her. But the school board investigated these rumors in some of its meetings, without making any direct resolution, and it made public the minutes of its meetings in which the accusations were mentioned. This court held that the district court erred in directing a verdict in favor of the defendant school board in that situation. *McGhee I*, 564 F.2d at 910.

I would hold in the instant case that the police department took accusations originating with the FBI, dignified them by having a formal investigation, and contributed to the public awareness of charges, which, if not resolved, would severely damage Melton's reputation. I would hold that although perjury was an issue on the agenda of the Disciplinary Review Board hearing, because no evidence was permitted with respect to it and

no resolution was made, in violation of the department's own regulations, the police department did too little to remedy the public's impression that Melton was a perjurer. I would hold that the police department's announcement that the firing of Melton was on a different basis, without any comment on the perjury issue, in the general context of the publicity surrounding the police department's actions was insufficient to meet the duty to dispel the stigma the department had helped create. The fact the jury awarded punitive damages, as well as actual damages, supports my perception that the public would believe defendants stigmatized Melton.

II

Finally, in order to establish whether my separate opinion should be a concurrence in the court's judgment or a dissent, I believe that I must treat the other issues on which we granted en banc rehearing.

A

The second issue for rehearing was whether the district court committed plain error in failing to instruct the jury that it must find that the stigmatizing charges were false before finding that Melton was deprived of liberty. As the majority notes, the Supreme Court has settled this issue in *Codd v. Velger*, 429 U.S. 624 (1977). In dealing with a liberty interest claim involving the discharge of a policeman, the Court stated, "When we consider the nature of the interest sought to be protected, we believe the absence of any such allegation [of falsity] or finding is fatal to [the officer's] claim under the Due Process Clause

that he should have been given a hearing." *Id.* at 627. Thus, a plaintiff must allege the falsity of the stigmatizing charge, which Melton did in the instant case. I R. tab 1/9/84 at 8 (Complaint). The Supreme Court probably would hold that the burden of proof of showing the falsity of the allegations is upon the plaintiff. *See Restatement (Second) of Torts* § 580B comment j, § 581A comment b (1976). *See also Rosenstein v. City of Dallas*, 876 F.2d 392, 395 n.2 (5th Cir. 1989), *opinion reinstated in part*, 901 F.2d 61 (5th Cir.) (en banc), *cert. denied*, 111 S. Ct. 153 (1990).

The district court failed to include the element of falsity in Instruction 7, treating explicitly Melton's liberty interest claim; defendants, however, did not object; and the truth of the underlying charge of perjury was never an issue at the trial, as the majority notes. Thus, the court's error in this instruction does not require reversal.

B

The district court instructed the jury that due process required that Melton be given a pre-termination hearing before an impartial tribunal, notice of the charges against him, a reasonable time before the hearing, an opportunity to be heard at a meaningful time and in a meaningful manner, and an opportunity to have an attorney present and to confront and cross-examine his accusers. I R. tab 141 at 16. The issues of pre- versus post-termination hearing and the type of hearing required are necessarily intertwined, and should be treated together. Again I think the Supreme Court has resolved these issues.

In *Roth* the Supreme Court stated flatly that, "When protected [liberty or property] interests are implicated,

the right to some kind of *prior* hearing is paramount." 408 U.S. at 569-70 (emphasis added). In an explanatory footnote, the Court elaborated as follows:

> "Before a person is deprived of a protected interest, he must be afforded opportunity for some kind of hearing, 'except for extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event.' *Boddie v. Connecticut*, 401 U.S. 371, 379. 'While "[m]any controversies have raged about . . . the Due Process Clause," . . . it is fundamental that except in emergency situations (and this is not one) due process requires that when a State seeks to terminate [a protected] interest . . . , it must afford "notice and opportunity for hearing appropriate to the nature of the case" *before* the termination becomes effective.' *Bell v. Burson*, 402 U.S. 535, 542. For the rare and extraordinary situations in which we have held that deprivation of a protected interest need not be preceded by opportunity for some kind of hearing, *see* [citations omitted]."

Roth, 408 U.S. at 570 (emphasis in original). Justice Stevens, in his dissent in *Codd*, 429 U.S. at 633, quoted *Roth* as standing for the proposition that "the Constitution mandates 'a full prior hearing' " if a charge involves deprivation of a liberty interest. *See also id.* at 633 n.3, 634.

Nevertheless, in *Arnett v. Kennedy*, 416 U.S. 134 (1974) (plurality opinion), then Justice Rehnquist, speaking only for himself, Chief Justice Burger and Justice Powell, distinguished the liberty interest in a discharge case from "the elemental freedom from external restraint," *id.* at 157, and stated:

> "that liberty is not offended by dismissal from employment itself, but instead by dismissal based upon an unsupported charge which could wrongfully injure the reputation of an employee. Since the purpose of the hearing in such a case is to provide the person 'an opportunity to clear his name,' a hearing afforded by administrative appeal procedures *after* the actual dismissal is a sufficient compliance with the requirements of the Due Process Clause."

Id. (emphasis added).

The Supreme Court later revisited the issue of pre- versus post-termination hearings in *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985), in which it overruled *Arnett* in part. In *Loudermill* the Court addressed this issue in the context of a deprivation of a property right to employment, not liberty, *see id.* at 547 n.13, but I believe its holding is applicable to liberty interest claims as well. *See Zinermon v. Burch*, 110 S.Ct. 975 (1990) (requiring pre-deprivation hearing in liberty interest case of allegedly incompetent mental patient). The Court held in *Loudermill*:

> "the Due Process Clause provides that certain substantive rights – life, liberty, and property – cannot be deprived except pursuant to constitutionally adequate procedures. The categories of substance and procedure are distinct. Were the rule otherwise, the Clause would be reduced to a mere tautology. 'Property' cannot be defined by the procedures provided for its deprivation any more than can life or liberty. The right to due process 'is conferred, not by legislative grace, but by constitutional guarantee. . . .' "

. . .

> An essential principle of due process is that a deprivation of life, liberty, or property 'be preceded by notice and opportunity for hearing appropriate to the nature of the case.' *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950). We have described 'the root requirement' of the Due Process Clause as being 'that an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest.' *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971) (emphasis in original); *see Bell v. Burson*, 402 U.S. 535, 542 (1971). This principle requires 'some kind of a hearing' prior to the discharge of an employee who has a constitutionally protected property interest in his employment."

Loudermill, 470 U.S. at 541-42 (footnote omitted).

After reviewing the considerations that justify a pretermination hearing the Court stated:

> "The foregoing considerations indicate that the pretermination 'hearing,' though necessary need not be elaborate. We have pointed out that '[t]he formality and procedural requisites for the hearing can vary, depending upon the importance of the interests involved and the nature of the subsequent proceedings.' *Boddie v. Connecticut*, 401 U.S., at 378. *See Cafeteria Workers v. McElroy*, 367 U.S. 886, 894-895 (1961). In general, 'something less' than a full evidentiary hearing is sufficient prior to adverse administrative action. . . .
>
> . . . Here, the pretermination hearing need not definitively resolve the propriety of the discharge. It should be an initial check against mistaken decisions – essentially, a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action.

> The essential requirements of due process, and all that respondents seek or the Court of Appeals required, are notice and an opportunity to respond. The opportunity to present reasons, either in person or in writing, why proposed action should not be taken is a fundamental due process requirement. The tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story. To require more than this prior to termination would intrude to an unwarranted extent on the government's interest in quickly removing an unsatisfactory employee."

Loudermill, 470 U.S. at 545-46 (citations omitted).

In approving a less than full pre-termination hearing – one without a right to representation by an attorney or to cross-examine adverse witnesses – the Court explicitly relied upon a state statute which gave such rights post-termination: "Our holding rests in part upon the provisions in Ohio law for a full post-termination hearing." *Id.* at 546; *see also id.* at 547 n. 12.

Following the reasoning of *Loudermill*, I would hold that a pre-termination hearing is required when charges have been made public or are intended to be released to the public at termination, and the charges are sufficiently serious to rise to the level of a liberty interest. Provided that a "full" post-termination hearing is available if requested by the employee, with the right to representation by an attorney and to present evidence and to confront and cross-examine witnesses who have made the accusations, I would hold that the pre-termination

hearing may be limited as described in *Loudermill*.[2] That is, it may consist of notice, an explanation of the employer's evidence, and an opportunity to respond, in person or in writing, to the charge against the employee before final action is taken by the employer.

Our case law has required a pre-termination hearing when liberty interests are implicated, *see, e.g., Richardson v. City of Albuquerque*, 857 F.2d 727, 731 (10th Cir. 1988); *Walker v. United States*, 744 F.2d 67, 70-71 (10th Cir. 1984). To the extent those cases may be read to require more than is stated above, they should be overruled.

Applying this analysis to the case at hand, I believe it was error to give a jury instruction that a full scale adversarial pre-termination hearing was constitutionally required. But the error was harmless. Melton received notice but was given no pre-termination opportunity to confront the employer's evidence on the perjury charge. He was given no chance to address the accusation that he had lied under oath in the affidavit and at trial. The reason, apparently, was that the employer had decided that the perjury allegation was untrue, and it did not intend to rely upon it to terminate Melton. *See* XII R. 694. But the charge had been made public, and Melton was entitled to an equally public statement of his innocence, if the charge was admittedly false. That he did not get. Thus, Melton was denied the procedural process due him.

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[2] A city council, school board, or, as here, a police disciplinary review board, would be a proper adjudicator providing its membership is composed only of those who have the capacity to make a neutral or unbiased decision.

In conclusion, I would affirm the conclusion of the panel opinion that no retrial is warranted on the liberty interest claim.

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

RAYMON J. MELTON, Plaintiff-Appellee/ Cross-Appellant, vs. CITY OF OKLAHOMA CITY, a municipal corporation, LLOYD A. GRAMLING, Chief of Police for the City of Oklahoma City, GERALD L. EMMETT, Assistant Chief of Police for the City of Oklahoma City, MARVIN MAXWELL, Major, Oklahoma City Police Department, WILLIAM R. CHAMBLESS, Major, Oklahoma City Police Department, CARL SMITH, Lieutenant, Oklahoma City Police Department, ROBERT TAYLOR, Lieutenant, Oklahoma City Police Department, DAVID MCBRIDE, Lieutenant, Oklahoma City Police Department, and PAULA HEARN, Assistant to the City Manager, Defendants-Appellants/ Cross-Appellees.	)	Nos. 85-1738 85-1739 85-1740 85-1741 85-1742 85-1811

ORDER FOR REHEARING EN BANC
(Nov. 3, 1989)

Before HOLLOWAY, Chief Judge and McKAY, LOGAN, SEYMOUR, MOORE, ANDERSON, TACHA, BALDOCK, BRORBY and EBEL, Circuit Judges and SAFFELS, District Judge*.

PER CURIAM.

Before the court are defendants'-appellants' petitions for rehearing with suggestion for rehearing en banc. Upon a vote of the panel members, *see* 879 F.2d 706, the petitions for rehearing are denied. A majority of the court's active judges, however, agree to rehear these cases en banc limited to the following issues:

1. Whether the district court committed plain error in instructing the jury that a liberty interest may be violated by charges which "would stigmatize the employee's reputation *or* foreclose future employment opportunities"?

2. Whether the district court committed plain error in failing to instruct the jury that before a liberty interest may be infringed, the charges must be found to be false?

3. Whether the plaintiff was entitled to a name-clearing hearing complete with the right to confront and cross-examine witnesses before the disciplinary review board, assuming dissemination of the perjury charges deprived plaintiff of a liberty interest?

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* Honorable Dale E. Saffels, United States District Judge for the District of Kansas, sitting by designation.

4. Further assuming plaintiff is entitled to some sort of a hearing, need it be pre-termination, or would some post-termination hearing or name-clearing opportunity be adequate?

The clerk of court is hereby directed to enter the appropriate briefing and oral argument schedule.

SO ORDERED.

PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

RAYMON J. MELTON, Plaintiff-Appellee/ Cross-Appellant, vs. CITY OF OKLAHOMA CITY; a municipal corporation; LLOYD A. GRAMLING; Chief of Police for the City of Oklahoma City; GERALD L. EMMETT; Assistant Chief of Police for the City of Oklahoma City; MARVIN MAXWELL; Major; Oklahoma City Police Department; WILLIAM R. CHAMBLESS; Major; Oklahoma City Police Department; CARL SMITH; Lieutenant; Oklahoma City Police Department; ROBERT TAYLOR; Lieutenant; Oklahoma City Police Department; DAVID MCBRIDE; Lieutenant; Oklahoma City Police Department; and PAULA HEARN; Assistant to the City Manager, Defendants-Appellants/ Cross-Appellees.	)	Nos. 85-1738 85-1739 85-1740 85-1741 85-1742 85-1811

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE WESTERN
DISTRICT OF OKLAHOMA
(D.C. No. CIV-84-65-E)

Robert D. Allen, Municipal Counselor, and Richard C. Smith, Assistant Municipal Counselor (Lawrence E. Naifeh, Diane D. Huckins, and Jonathan D. Woods, Assistant Municipal Counselors, also on the briefs), Oklahoma City, Oklahoma, for Defendants-Appellants/Cross-Appellees.

Steven M. Angel (Carl D. Hughes and Michael Gassaway with him on the briefs), of Hughes & Nelson, Oklahoma City, Oklahoma, for Plaintiff-Appellee/Cross-Appellant.

Before MCKAY and BLADOCK, Circuit Judges, and SAFFELS, District Judge*.

MCKAY, Circuit Judge.

These six appeals arise from a jury verdict and various post-trial orders entered by the United States District Court for the Western District of Oklahoma. Plaintiff, a police officer, was fired by the City of Oklahoma City. Plaintiff sued the City of Oklahoma City under 42 U.S.C. §§ 1983, 1985 and 1988, and 18 U.S.C. §§ 1961-68 (1982), alleging that he was deprived of liberty and property without due process of law and that he was discharged in retaliation for the exercise of his First Amendment speech rights.

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* Honorable Dale E. Saffels, United States District Judge for the District of Kansas, sitting by designation.

I. FACTS

Raymon J. Melton, a lieutenant with nearly twenty-one years of service in Oklahoma City's police department, was fired for alleged violations of the Police Code of Ethics. Prior to Mr. Melton's termination, the Federal Bureau of Investigation ("FBI") and the United States Attorney were investigating one of Mr. Melton's longtime friends, then-judge William C. Page. In preparation for the Page trial, the federal prosecutor interviewed Mr. Melton whom he considered to be a potential defense witness. At least some of the information discussed with the federal prosecutor during that interview was gained in the course of Mr. Melton's duties as a police officer. In order to protect himself from possible misrepresentation, Mr. Melton covertly taped his interview with the assistant U.S. attorney.

During the interview, Mr. Melton gave the prosecutor what Mr. Melton believed to be exculpatory information concerning Mr. Page. This information was not released to Mr. Page's attorneys.[1] Mr. Page's lawyers subsequently contacted Mr. Melton about testifying for Mr. Page at trial. Mr. Melton discussed the content of his interview with the federal prosecutor with Mr. Page's counsel. He

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[1] Mr. Melton believed that the information he gave the federal prosecutor should have been turned over to defense counsel pursuant to Brady v. Maryland, 373 U.S. 83, 87 (1963) (upon request by the defense, prosecution cannot suppress evidence favorable to the accused).

also offered them the recording he had made of the interview.[2]

Mr. Melton and one other policeman testified for the defense at Mr. Page's trial. After the trial, in response to a complaint made by an FBI agent involved in the Page investigation, the Oklahoma City Police Department began an Internal Affairs investigation of Mr. Melton.[3] The investigation centered on two allegations: (1) that Mr. Melton had violated the Police Code of Ethics by disclosing to Mr. Page's counsel the details of a confidential discussion between himself and the federal prosecutor, and (2) that Mr. Melton had perjured himself in an affidavit and during the Page trial. These allegations and the fact of the Internal Affairs investigation were released to the press by defendant David McBride, the Police Department's Public Information Officer.

Mr. Melton received written notice that as a result of the Internal Affairs Investigation a Disciplinary Review Board would convene to hear the charges. The Review

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[2] Mr. Page's counsel used Mr. Melton's tape as the basis for an affidavit which accompanied a Motion to Dismiss because the prosecutor failed to provide exculpatory material to defense counsel under *Brady*. The court hearing the Page trial denied the motion because it found the material was not *Brady* information. At trial on this matter, however, the court instructed the jury that the taped conversation contained *Brady* information that the prosecutor was obligated under court order to turn over to defense counsel in the Page case.

[3] The Department also investigated the other officer who testified at the Page trial; he decided to retire from the police department.

Board convened as scheduled.[4] At his arrival, the Chair informed Mr. Melton that the Board would not entertain discussion nor consider the perjury allegations; rather it would focus solely on the alleged violation of the Police Code of Ethics. After Mr. Melton testified, the Board, by a six-to-one vote, found that he had violated the Code of Ethics and recommended that he be fired. That same day with the approval of the City Manager, defendant Lloyd A. Gramling, Oklahoma City's Chief of Police, fired Mr. Melton. Lieutenant McBride confirmed Mr. Melton's dismissal to the press,[5] but did not comment on the disposition of the perjury charge. Shortly after the dismissal (and without prior notice or hearing) Mr. Melton received a

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[4] The members of the Disciplinary Review Board who were individual defendants in this action are: Board Chair Gerald L. Emmett (Assistant Chief of Police); William R. Chambless (Major, Oklahoma City Police Department), Marvin Maxwell (Major, Oklahoma City Police Department), Robert Taylor (Lieutenant, Oklahoma City Police Department), and Paula Hearn (Assistant to the City Manager).

Members of the Review Board who were not parties to this action are Ted Pollock (Lieutenant, Oklahoma City Police Department) and John Clark (Senior Police Officer, Oklahoma Police Department). Mr. Clark sat on the Board as the representative of the Fraternal Order of Police, the Plaintiff's collective bargaining agent.

[5] It is undisputed that Lieutenant McBride's statements to the press following Mr. Melton's dismissal were limited to confirming the dismissal and stating, as grounds therefor, the violation of the Police Code of Ethics. Nevertheless, Mr. Melton challenges Lieutenant McBride's actions on the basis of the earlier dissemination of the perjury charges, which Mr. Melton was never allowed to refute and which Lieutenant McBride never withdrew.

letter from Chief Gramling which forbade plaintiff from representing himself in any way as a retired police officer.[6]

Mr. Melton sued the City of Oklahoma City and some members of the Review Board alleging that he was deprived of property and liberty without due process of law, that he was discharged in retaliation for exercising his free speech rights, and that the City violated federal RICO provisions. He also sought punitive damages against the defendants.

Mr. Melton's RICO claim was dismissed at the close of plaintiff's evidence. The jury rendered a general verdict against the City and certain individual defendants in the amount of $1,272,000. The trial court set aside the

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[6] Although Mr. Melton was dismissed from his employment, his years of service entitled him to receive retirement benefits. Also due to his retirement status, Mr. Melton was entitled under Oklahoma law to retain his "status as peace officer [ ] of the State of Oklahoma, retired, and as such [to] retain the right to keep and bear firearms when approved by the officials of the municipality of retirement." Okla Stat. tit. 11, § 50-125 (West 1978).

Chief Gramling's letter to Mr. Melton stated:

> This letter is to inform you of your status as a retired officer from this Department.
>
> Due to your unmeritorious retirement, you do not retain the privilege or approval to bear firearms or otherwise represent yourself as a commissioned officer of the Oklahoma City Police Department, as provided in State Law 11 O.S. 50-125.

punitive damages award against all but one of the defendants on a j.n.o.v. motion.[7] The jury found for the defendants on the section 1985 claim. The City, the individual defendants, and Mr. Melton raise a number of issues on appeal. Their respective contentions are addressed below.

II. Liability Determinations

A. Free speech claim.

On appeal, the City challenges the trial court's First Amendment instruction because it does not address the application of the First Amendment in the context of a public employee's speech. In examining a challenge to jury instructions, "we review the record as a whole, to determine whether the instructions 'state the law which governs and provided the jury with an ample understanding of the issues and the standards applicable.' " *Big Horn Coal Co. v. Commonwealth Edison Co.*, 852 F.2d 1259, 1271 (10th Cir. 1988) (quoting *Ramsey v. Culpepper*, 738 F.2d 1092, 1098 (10th Cir. 1984)). We need not address whether this instruction is proper because "[t]he inquiry into the protected status of speech is one of law, not fact." *Connick v. Myers*, 461 U.S. 138, 148 n.7 (1983). *See also Wren v. Spurlock*, 798 F.2d 1313, 1318 (10th Cir. 1986), *cert. denied*, 479 U.S. 1085 (1987). Thus, the trial court improperly submitted to the jury the question of whether Mr.

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[7] The jury found in favor of Lieutenant Carl Smith, the officer who conducted the Internal Affairs investigation, on all causes of action. The jury also exonerated Lieutenant McBride on the First Amendment and deprivation of property claims, but held him liable for deprivation of liberty without due process of law.

Melton's speech was constitutionally protected. However, we find that the court's improper submission of this First Amendment issue to the jury constitutes harmless error because we conclude as a matter of law that Mr. Melton's First Amendment rights were violated.

In cases which implicate the First Amendment, "an appellate court has an obligation to 'make an independent examination of the whole record' in order to make sure that 'the judgment does not constitute a forbidden intrusion on the field of free expression.' " *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 499 (1984) (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 284-86 (1964)). The court's inquiry is a multi-step process. First, the court must determine whether a public employee's speech touches upon a matter of public concern. *Connick*, 461 U.S. 138. Second, if the statement satisfies the public concern inquiry, the court must then balance the interests of the employee in making the statement against the public employer's interest in the effective and efficient fulfillment of its responsibilities to the public. *Pickering v. Board of Educ.*, 391 U.S. 563, 568 (1968). Third, assuming that both previous elements have been found in favor of the plaintiff, he or she must then prove that the protected speech "was a 'motivating factor' in the detrimental employment decision." *Mt. Healthy City School Dist. v. Doyle*, 429 U.S. 274, 287 (1977). Fourth and finally, if plaintiff makes this showing, the burden then shifts to the employer to show by a preponderance of evidence that it would have reached the same decision in the absence of the protected activity. *Id.* While, as we have already stated, the first two steps of the process involve questions of law for the court, the two-part *Mt.*

Healthy analysis involves questions of fact for the jury. *Koch v. City of Hutchinson*, 847 F.2d 1141 n.11 (10th Cir.) (en banc), *cert. denied*, 109 S.Ct. 262 (1988).

1. Public concern analysis.

Speech on a matter of public concern is speech which can "be fairly considered as relating to any matter of political, social, or other concern to the community." *Connick*, 461 U.S. at 146. Under *Connick*, "[w]hether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record." *Id.* at 147-48 (footnote omitted). *See also Koch v. City of Hutchinson*, 847 F.2d at 1436 (listing factors courts have considered in public concern analysis).

Our examination of the record in light of these factors convinces us that Mr. Melton's speech to defense counsel and at trial touched upon a matter of public concern. Mr. Melton's speech clearly related to political, social, or other concerns of the community. However, in determining whether speech is on a matter of public concern, "it is not always enough that 'its *subject matter* could in [certain] circumstances, [be] the topic of a communication to the public that might be of general interest.' [*Connick*, 461 U.S. at 148] n.8 (emphasis added). What is actually said on that topic must itself be of public concern." *Wilson v. City of Littleton, Colo.*, 732 F.2d 765, 769 (10th Cir. 1984).

Mr. Page was a public official under investigation and prosecution for malfeasance in his public duties.[8] Of course the public would want, and is arguably entitled to, information relating to a public official's guilt or innocence in a public trial which relates to his public duties. Additionally, Mr. Melton's speech was "calculated to disclose wrongdoing or inefficiency or other malfeasance on the part of government officials in the conduct of their official duties," *Koch*, 847 F.2d at 1445, by revealing what he believed to be exculpatory *Brady* material to Mr. Page's defense counsel and the court – information which might otherwise have been suppressed by the federal prosecutor. *See Connick*, 461 U.S. at 148 ("Nor did [the plaintiff] seek to bring to light actual or potential wrongdoing or breach of public trust on the part of [the employer]"). We conclude that Mr. Melton's speech to Mr. Page's defense counsel and at Mr. Page's trial dealt with a matter of "public concern" within the meaning of *Pickering* and its progeny.

2. The Pickering balancing.

We find that the balance between the State's interest as an employer in the effective functioning of its public enterprise and Mr. Melton's interest in testifying at trial and his interest in talking with Mr. Page's defense counsel clearly tip in favor of Mr. Melton in both cases.

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[8] Mr. Page was being investigated and prosecuted for racketeering activities in his capacity as a public official.

a. Mr. Melton's trial testimony.

The First Amendment protects the right to testify truthfully at trial. *Smith v. Hightower*, 693 F.2d 359, 368 (5th Cir. 1982). Under *Pickering* balancing we find that Mr. Melton's interest in testifying truthfully at trial easily outweighs the City's interest in preventing the testimony in order to preserve the efficiency and effectiveness of the police department.

Although police officers rarely testify on behalf of criminal defendants, they are frequently called upon to testify at trial. In cases other than those in which officers testify against each other, it is difficult to imagine a situation in which the efficiency and effectiveness of the department would be significantly impaired.[9] It is possible that an officer's testimony might impair harmony among fellow officers if officers disagree on the propriety of such testimony. It may also detrimentally impact on the kind of close working relationships which depend on personal loyalty and confidence. However, truthful trial testimony is unlikely to impair discipline by immediate superiors, interfere with the regular operation of the enterprise or impede the officer's performance of his daily duties.

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[9] "[P]ertinent considerations [are] whether the statement impairs discipline by superiors or harmony among coworkers, has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary, or impedes the performance of the speaker's duties or interferes with the regular operation of the enterprise." Rankin v. McPherson, 107 S.Ct. 2891, 2899 (1987) (citing *Pickering*, 391 U.S. at 570-573).

One troubling aspect of this case concerns the weight to be given in a *Pickering* balance to the State's interest in departmental confidentiality. The need for confidentiality and the resultant disruption caused by its breach in the law enforcement context cannot be gainsaid. Yet, absent circumstances which indicate a serious security risk or a risk that the business of the department will be seriously impaired due to a breach of trust, we feel that the confidentiality of information given at trial is not paramount in assessing the City's interest in preventing trial testimony.

In any event, Mr. Melton's interest in testifying at trial is so strong in this case that any disruption or impairment of the enterprise would have to be extreme in order to justify preventing trial testimony. The City offered no evidence that Mr. Melton's trial testimony affected the operation of the enterprise.

In addition, Mr. Melton's interest in testifying at trial was compelling. Mr. Melton had a clear public duty to testify. In many instances, that duty might be enhanced by judicial compulsion. Certainly we would not expect a public employee to suffer contempt in order to preserve the efficiency and effectiveness of a public employer, even the police department. Moreover, Mr. Melton had an interest in helping a friend who could be well-served by character testimony and what Mr. Melton believed to be exculpatory material. When we balance Mr. Melton's interests in testifying against what little disruption may occur due to an officer's testimony on behalf of a criminal defendant, we find that Mr. Melton's interest clearly prevails.

b. Mr. Melton's communication with defense counsel.

With respect to Mr. Melton's communication to defense counsel, we find that although the *Pickering* balance is closer than in the case of trial testimony, the balance tips in favor of Mr. Melton.

The City has an interest in preventing Mr. Melton's communication with defense counsel because of its impact on intergovernmental harmony and effectiveness. Obviously, the direct result of a city police officer's communication with defense counsel in a federal prosecution may be the impairment of the department's cooperative relations with federal law enforcement personnel.[10]

Notwithstanding the legitimacy of the City's interest in fostering harmonious relations with other law enforcement agencies, for purposes of *Pickering* balancing greater

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[10] This court can imagine several situations in which the impairment or disruption of cooperative efforts between law enforcement agencies could affect *inter*governmental effectiveness; for instance, if federal agents and local officers were working together to dismantle a drug ring, or a fencing operation implicating interstate commerce, or the investigation of the assassination of a prominent citizen. In all these cases, if the law enforcement operation were divided by a "turncoat" to the enterprise, arguably neither agency by itself could efficiently, competently, and fully complete the investigation. In addition, if federal agencies feel they cannot trust local law enforcement personnel to cooperate with or at least refrain from disrupting their investigations and prosecutions, they would be more reluctant to engage local law enforcement agencies for the benefit of both.

weight is given to the effect of the disclosure on *intra-departmental* effectiveness and efficiency. *Pickering* focuses on the balance between the interests of the employee in free speech and "the interest of the State, as an employer, in promoting the efficiency of the public services *it* performs through *its* employees." 391 U.S. at 568 (emphasis added). *See also Rankin v. McPherson*, 107 S.Ct. 2891, 2899 (1987) ("[T]he state interest element of the [*Pickering*] test focuses on the effective functioning of the public employer's enterprise."). Thus, we must examine the extent to which Mr. Melton's communications with Mr. Page's counsel affected *intradepartmental* relationships and performance.

The City's primary, if not exclusive, argument is that it has an interest in preventing this speech in order to protect the confidentiality of communications in a law enforcement context. We agree that breaches of departmental confidentiality could impair discipline and control by immediate superiors, and detrimentally impact on the kind of close working relationships among officers for which personal loyalty and confidence are necessary. We also agree that a breach of departmental confidentiality *could* interfere with the regular operation of the enterprise. If an officer cannot keep police business in the office, he is a potential threat to follow officers. In addition, neither his peers nor his supervisors could trust him to conduct sensitive investigations. Any breach of confidentiality, therefore, reflects negatively on an officer's ability and competence to perform his job, and each officer's competence affects the overall effectiveness of the department.

Although we recognize the *potential* impact that a breach of confidentiality may have on the department, we must point out that the government must introduce evidence of an actual disruption of its services resulting from the speech at issue. *See Rankin*, 107 S.Ct. at 2899; *Pickering*, 391 U.S. at 570-71.[11] While the confidentiality claim may, under other circumstances, tip the balance in favor of the government, here the City failed to make its case.

Moreover, we are unpersuaded that the City's fundamental assumption – that any communication between law enforcement officials is by its very nature confidential – is correct. It is undisputed that neither Mr. Melton

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[11] The dissent's assertions notwithstanding, we are not creating a new rule nor are we increasing the quantum of proof which the government must carry. We merely recognize what we believe to be an obvious *Pickering* requirement that the government show *some* ascertainable damage to its functioning as a result of the challenged speech. *Accord* Roth v. Veteran's Admin., 856 F.2d 1401, 1407 (9th Cir. 1988); Conner v. Reinhard, 847 F.2d 384, 390 (7th Cir. 1988); Zamboni v. Stamler, 847 F.2d 73, 78 (3d Cir.), *cert. denied*, 109 S.Ct. 245 (1988); American Postal Workers Union v. Postal Service, 830 F.2d 294, 303 n.12 (D.C. Cir. 1987). In our view the government cannot prevail in a *Pickering* balance by merely relying on *unsubstantiated* allegations of disruption. Some circuits appear to take the position that a reasonable belief that disruption will occur is sufficient, at least in some circumstances. *See, e.g.*, Matherne v. Wilson, 851 F.2d 752, 761 n.53 (5th Cir. 1988); Jurgensen v. Fairfax County, 745 F.2d 868, 879 (4th Cir. 1984); Waters v. Chaffin, 684 F.2d 833, 839 n.12 (11th Cir. 1982). None, however, accept purely speculative allegations. Here, the City made *no* showing of disruption or, for that matter, potential disruption; only a bald assertion that Mr. Melton's actions in communicating with Page's counsel implicated the City's confidentiality interests.

nor the City Police Department participated in an official capacity in the Page investigation and prosecution; it was solely a federal matter. We view the communication between Mr. Melton and the prosecutor (which in turn was disclosed to Mr. Page's counsel) as one arising *outside* the scope of departmental confidentiality. The transcript of Mr. Melton's interview with the federal prosecutor clearly shows that the prosecutor interviewed Mr. Melton solely because he believed Mr. Melton would probably testify as a defense witness in the Page trial. Furthermore, while we are persuaded that at least some of the information which Mr. Melton possessed initially had been gained in the course of his official duties, the City did not focus on that fact in its confidentiality claim.

Under these circumstances, Mr. Melton's interest in this speech outweighs the City's interest in *intradepartmental* relations. He is under a high duty as a citizen to come forward with information relevant to a federal investigation and prosecution. In addition, Mr. Melton believed that the information he communicated to defense counsel was actual *Brady* material that he was under a duty to supply. Mr. Melton also indicated that he feared if he did not disclose this information, he would be implicated in Mr. Page's activities and possibly suffer prosecution as a result. As with his trial testimony, he believed he was disclosing exculpatory material at the request of defense counsel in a public investigation -- information which the federal prosecutor did not otherwise disclose.

3. Protected speech as the "motivating factor" in the dismissal – the Mt. Healthy inquiry.[12]

Having determined that both Mr. Melton's trial testimony *and* his communications with Mr. Page's defense counsel constituted protected speech within the meaning of *Connick* and *Pickering*, we must now determine whether Mr. Melton's actions played a causative role in his dismissal.

a. Mr. Melton's trial testimony.

Throughout the trial, defendants repeatedly denied that Mr. Melton's testimony in the Page trial was in any way related to his dismissal. However, Mr. Melton presented evidence, albeit circumstantial, that his testimony may have been a substantial or motivating factor in his dismissal. Specifically he introduced testimony by the only other police officer who testified at the Page trial. Like Mr. Melton, that individual too was subjected to an Internal Affairs investigation shortly after his testimony. Eventually the other officer chose involuntary retirement rather than risk losing his retirement benefits if he were fired. From this evidence the jury *could* have determined that Mr. Melton's trial testimony was indeed a substantial or motivating factor in his dismissal, notwithstanding defendants' disavowal of that fact.

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[12] Because of the facts of this case, we treat the two steps of the *Mt. Healthy* inquiry together, although analytically they are distinct.

As to the second *Mt. Healthy* prong, defendants claim that the trial testimony was not the basis for the disciplinary action taken against Mr. Melton. Their consistent position has been that Mr. Melton was dismissed for his communication with Mr. Page's defense counsel.

b. Mr. Melton's communication with defense counsel.

Not only did Mr. Melton make a substantial showing that his dismissal was in fact a result of his communication with Mr. Page's counsel, defendants readily admitted that fact. The jury had ample evidence on which to find that those actions were the motivating factor in plaintiff's discharge.

c. The jury instruction.

In its First Amendment instruction the court improperly combined the two bases for potential liability: plaintiff's trial testimony and his communications with counsel.[13]

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[13] The jury instruction on the First Amendment claim states in pertinent part:

> In order to prevail upon his civil rights claim against the defendants for a violation of his First Amendment right to freedom of speech, plaintiff must establish the following elements by a preponderance of the evidence:
>
> FIRST: That his actions in connection with the tape recording and/or in appearing as a

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Additionally, while the jury instruction addressed the first prong of the *Mt. Healthy* inquiry – whether plaintiff had shown that his protected speech was the substantial or motivating factor in the dismissal – the court never informed the jury as to the defendants' burden of rebuttal under *Mt. Healthy*.

We find we cannot affirm the jury's verdict against the individual defendants on the First Amendment claim because the errors in the instruction leave us "uncertain as to the actual ground on which the jury's decision rested." *Zant v. Stephens*, 462 U.S. 862, 881 (1983). Under *Zant*, "a general verdict must be set aside if the jury was instructed that it could rely on any of two or more independent grounds, and one of those grounds is insufficient, because the verdict may have rested exclusively on the insufficient ground." *Id; see also Sunkist Growers, Inc. v. Winckler & Smith Citrus Prods. Co.*, 370 U.S. 19, 30 (1962). Because we determine herein that the individual defendants are qualifiedly immune under *Harlow* if the dismissal was for Mr. Melton's communications with Mr. Page's defense counsel, *see* discussion *infra* at 46-49, that ground would be an insufficient basis for a verdict

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witness in a federal proceeding were constitutionally protected; and,

SECOND: That the exercise of his constitutional right to freedom of speech was a motivating factor in the defendant City's decision to terminate his employment.

Brief of Defendant/Appellant, Jury Instruction No. 5, First Amendment Claim, Appendix at 7.

against them.[14] Consequently, we reverse the jury verdict on the First Amendment claim and remand for a new trial on the issue of whether Mr. Melton's trial testimony was a substantial motivating factor in his discharge.

B. Procedural due process claims.

Mr. Melton alleged at trial that the City deprived him of two property interests without due process of law: (1) a property interest in his employment as a lieutenant in the Oklahoma City Police Department, and (2) a property interest in his status as a retired police officer. Mr. Melton also alleged that the City deprived him of liberty without due process of law by publicly disseminating stigmatizing charges in connection with his dismissal.

1. Deprivation of property.

The City raises three issues on appeal concerning Mr. Melton's procedural due process claim arising out of his property interest in continued employment:[15] (1) that the

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[14] Either basis of liability submitted to the jury is adequate to impose liability on the City for the First Amendment claim. Consequently, we can affirm the jury's verdict notwithstanding the failure to separate the two bases in the instruction. *See* discussion of municipal liability *infra* at 32-38.

[15] On appeal, the City challenges the court's determination that Mr. Melton had a property interest in his continued employment. It is well established that such a property interest may be created by a state statute, ordinance, or express or implied contract; and "the sufficiency of the claim of

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court erred in denying defendants' motion for a directed verdict; (2) that the court erred in instructing the jury that

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entitlement must be decided by reference to state law." *See* Bishop v. Wood, 426 U.S. 341, 344-45 (1976); *see also* Vinyard v. King, 728 F.2d 428, 432 (10th Cir. 1984). The City argues that the organic law of the City – the City Charter – provides that removal of a classified employee (such as Mr. Melton in this case) "shall be solely for the good of the service." This language has been authoritatively construed not to create a property interest in Oklahoma City employment. Thus, the City argues, neither the Police Department Policy Manual nor the City's Policies and Procedures Manual can supplant "the conditions of employment provided for by the Charter." Appellant-City's Brief in a Chief, at 14.

Although compelling, the City's argument was not properly raised to the trial court nor preserved for appeal. *See* Fed. R. Civ. P. 51. Rule 51 specifically requires a party to object to an instruction before its submission to a jury. Our precedent uniformly holds that this court will "not review the propriety of a jury instruction unless counsel has timely objected to the instruction at trial." *See* Ryder v. City of Topeka, 814 F.2d 1412 (10th Cir. 1987). Although this circuit recognizes a *narrow* plain error exception to Rule 51's otherwise unqualified language, "we have applied this exception rarely," Glasscock v. Wilson Constructors, Inc., 627 F.2d 1065, 1068 (10th Cir. 1980); Prebble v. Brodrick, 535 F.2d 605, 612 (10th Cir. 1976), and only in the interest of justice. Pridgin v. Wilkinson, 296 F.2d 74, 76 (10th Cir. 1961). Here, neither the City nor the individual defendants ever offered their own proposed set of jury instructions. In fact, the City raised the issue of the City Charter (as negating plaintiff's alleged entitlement to a property interest) for the first time on its Motion for Judgment N.O.V. Record, vol. 1, Motion for Judgment Notwithstanding the Verdict, at 3, ¶ 11. The City has never explained why it failed to present such important evidence to the trial court. Because the City did not

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due process requires that a person deprived of a property interest in his continued employment with the City of Oklahoma City is entitled to a pre-termination hearing before an impartial tribunal, reasonable notice and an opportunity to be heard; and (3) that the court erred in excluding evidence of available *post*-termination procedures.

We first address whether the trial court erred in denying the defendants' motion for directed verdict on the procedural due process claim arising out of his property interest in continued employment. The standard of review for the denial of a motion for directed verdict is the same standard used by the trial court to test the original motion, *Swearngin v. Sears Roebuck & Co.*, 376 F.2d 637, 639 (10th Cir. 1967): Viewing the evidence and all inferences to be drawn therefrom in the light most favorable to the opponent of the motion, a directed verdict is proper only if "the evidence points but one way and is susceptible to no reasonable inferences which may sustain the position of the party against whom the motion is made." *Symons v. Mueller Co.*, 493 F.2d 972, 976 (10th Cir. 1974).

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raise this issue in its Answer, during its oral Motion for a Directed Verdict, nor as an objection to the jury instructions, neither the court nor the plaintiff was given timely opportunity to respond at trial with argument and relevant evidence. For these reasons we decline to review the issue on the basis of plain error. We conclude that on the record before it, the trial court did not err in ruling that Mr. Melton had a valid property interest in his continued employment.

Both parties agree that the Supreme Court's decision in *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985), governs the determination of what process is due before the state may deprive a person of an existing property interest.[16] The Supreme Court held that *before* "a tenured public employee" can be discharged, he "is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story." 470 U.S. at 546.

In light of the principles outlined in *Loudermill*, we conclude that Mr. Melton was not deprived of his property interest in continued employment without due process of law. Nearly one month before the disciplinary board was convened Mr. Melton was given written notice of the Internal Affairs investigation, the allegations against him, and the name of the party who made the allegations. Additionally, he was given five days' (three working days) written notice before the Review Board was actually convened. While this period may not have been as long as Mr. Melton desired, we believe that in this case it was adequate to prepare a defense in light of the earlier notice.[17]

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[16] *Loudermill* was decided by the Supreme Court after the events giving rise to this action took place. Nevertheless, the *Loudermill* decision interpreted case law extant at the time of Mr. Melton's discharge and on the issues before us does not mark a radical departure from prior precedent.

[17] The record indicates that the collective bargaining agreement between the City and the Fraternal Order of Police requires a minimum of 48 hours' notice before a disciplinary board is convened. The hours' notice given in this case was at

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The record plainly shows that Mr. Melton received due process before being deprived of his property interest in continued employment. We conclude that the trial court should have directed a verdict for defendants because the undisputed facts concerning notice and hearing clearly indicate that adequate process was given. Because we now direct a verdict for the defendants on this issue, we need not address their other grounds for appeal concerning Mr. Melton's property interest in continued employment. We reverse the jury verdict on this issue.

One additional problem plagues us. Mr. Melton originally alleged that he had been deprived of two property interests without due process of law: (1) his interest in continued full-time employment, and (2) his interest in his status as a retired police officer.[18] The problem is that which we faced earlier – that the trial court erroneously submitted both procedural due process determinations to the jury under one instruction. The jury rendered a general verdict for Mr. Melton on the combined procedural due process issues. However, our reversal on the continued employment issue invalidates the jury's general verdict. Therefore, we must now address the disposition of the retirement status issue.

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least double that minimum. We reserve judgment whether in all circumstances advance notice of 48, or even 96, hours would be adequate; in *this* case we believe it is.

[18] The City did not challenge the trial court's finding that Mr. Melton had a property interest in this status as a retired police officer. We do not disturb that finding on appeal.

As we discussed previously, *supra* at 18-19, under *Zant* we cannot affirm a general verdict if one of the basis for liability is insufficient as a matter of law. Although unlikely, the jury might have predicated its finding of liability on the City's alleged deprivation of plaintiff's property interest in continued employment. In view of our conclusion that adequate process was given on that claim, it should not have been submitted to the jury and constitutes an "insufficient ground" for the jury's general verdict for Mr. Melton.

Normally, we should remand for a new trial on the issue whether Mr. Melton was deprived of his property interest in retirement status without due process of law. We find it unnecessary to remand on this issue, however, because we find that the evidence developed in the record establishes as a matter of law that Mr. Melton received no process before he was deprived of his property interest in his status as a retired police officer. Oklahoma law authorizes retired police officers to retain their status as "peace officers". Okla. Stat. tit. 11, § 50-125 (West 1978). Additionally, the City's Police Department Operations Manual permits retiring officers with twenty years of service to retain their police badges. Operations Manual § 5.05. These provisions clearly created a property interest in Mr. Melton with respect to his status as a retired officer and in the benefits which accrue therefrom. Among these are the opportunity and common practice of accepting law enforcement-related employment and working those jobs in uniform. Notwithstanding these provisions, upon his dismissal Mr. Melton was asked to surrender his badge. Shortly thereafter, the Chief

informed him by letter that he was prohibited from representing himself in any way as a retired Oklahoma City police officer. Chief Gramling testified that the terms of the letter were intended to keep Mr. Melton from wearing his uniform – essentially foreclosing plaintiff from security-type employment.

At no time was Mr. Melton given any type of hearing in which to contest these actions. We conclude that there was no evidence from which reasonable jurors could have found for defendants on this issue. Consequently, we direct the trial court to enter a verdict for plaintiff on the procedural due process issue arising out of his status as a retired officer.

In sum, with respect to defendants' liability on Mr. Melton's deprivation of property claims, the trial court shall direct a verdict for defendants on the continued employment claim and direct a verdict for plaintiff on the retirement status claim. However, plaintiff's verdict shall be entered solely against Chief Gramling.[19] We remand for a new trial on two issues: (1) the damages to be assessed against Chief Gramling, and (2) the liability of the City for Chief Gramling's actions. The trial court must

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[19] The trial court not only erred in combining the two deprivation of property issues under one jury instruction but also erred by failing to limit its application to Chief Gramling and the City in the retirement status determination. The other individual defendants played no part in the deprivation of Mr. Melton's property interest in his retirement status. Therefore, we dismiss that claim with respect to the other individual defendants.

Under this claim, Chief Gramling is not entitled to qualified immunity. See discussion *infra* at 50-52.

determine as a matter of law if Chief Gramling acted as a "final policymaker" or if his actions were ratified by a "final policymaker" before it submits the question of damages against the City to the jury. *See City of St. Louis v. Praprotnik*, 108 S. Ct. 915 (1988), *and* discussion *infra*.

2. Deprivation of liberty.

The City makes four arguments on appeal in challenging its liability under Mr. Melton's liberty interest claim: (1) that the court erred in instructing the jury that an individual's liberty may be deprived when termination is accompanied by public dissemination of the *charges* against the employee, rather than the *reasons for dismissal*; (2) that the court erred in instructing the jury that when a person is deprived of liberty, due process requires a pre-termination hearing with right to counsel, and right to confront and cross-examine witnesses; (3) that the court erred in failing to instruct the jury that the disseminated information must be *false* as well as stigmatizing; and (4) that there was insufficient evidence to support the jury's verdict because plaintiff did not show he was damaged as a result of the claimed violation of the liberty interest.

a. Dissemination of the charges.

The City claims that any alleged damage to Mr. Melton's reputation arising from the dissemination in the news media of the perjury charges did not implicate any liberty interest because the damage must be proximately connected with the termination of the employment. *See*

Paul v. Davis, 424 U.S. 693, 701 (1976). Therefore, the damage, if any, must stem from dissemination of the *reasons* for dismissal, and not merely the dissemination of the original charges alone. The City argues that the sole reason for Mr. Melton's dismissal was violation of the Police Code of Ethics. Since the Review Board never addressed the perjury charge, the argument goes, that charge was not a reason for dismissal. Therefore, the City did not impair Mr. Melton's liberty interest.

The crucial focus of any liberty interest inquiry must be the *stigmatization* which results from the publication of false and damaging information, regardless of whether it involves dissemination of "charges" or "reasons for dismissal". It is disingenuous to argue that one can stigmatize by publishing charges of this nature and then dismiss the employee on other grounds and claim no impairment to the liberty interest because "charges" are not "reasons for dismissal". In either case, the plaintiff's liberty interest in his good name and reputation has been impaired. We hold that where all other elements are met, the publication of "charges" which stigmatize can give rise to a claim that plaintiff's liberty interest has been impaired.

Despite the language in some of our opinions concerning the dissemination of the *reasons* for dismissal as an element of the liberty interest claim, *see e.g., Miller v. City of Mission*, 705 F.2d 368, 373 (10th Cir. 1983), we believe our holding today is not inconsistent with the premise which underlies our previous opinions on this subject – that is, concern with protecting the good name and reputation of individuals from unlawful action which impairs an established right to employment. *See Paul v. Davis*, 424 U.S. at 708-09. In *McGhee v. Draper*, 639 F.2d 639

(10th Cir. 1981), we demonstrated our concern with and focus on actual stigmatization. In *McGhee*, the employer circulated charges of immorality but never formally charged the employee with these incidents. Under the circumstances of that case, we stated:

> The requirement of *Paul v. Davis* that reputational harm be entangled with "some more tangible interests" is thus met when a terminated or non-renewed § 1983 plaintiff can show that the termination at least aggravated his stigmatization. We do not mean to imply that this is a heavy burden for a plaintiff. Any termination occurring in an atmosphere where the plaintiff's reputation is at issue should be sufficient to meet *Paul*'s entanglement requirement. It should be the *state's* burden to show that termination is such a context is so removed from plaintiff's reputational concern that it in no way impacted upon it.

Id. at 643 n.2 (emphasis in original). Therefore, the circulation of the charges, coupled with the discharge, was sufficient to establish a liberty interest. *See also McGhee v. Draper*, 564 F.2d 902 (10th Cir. 1977). We concluded that in this case, as in *McGhee*, the dissemination of the charges coupled with dismissal was enough to establish a liberty interest which could not be deprived without due process of law. Therefore, the court's instruction in this regard was not erroneous.

b. Right to confront and cross-examine.

"The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.' " *Mathews v. Eldridge*, 424 U.S. 319,

333 (1976) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)). This requirement is applicable as well when a plaintiff alleges a deprivation of liberty without due process of law. *Board of Regents v. Roth*, 408 U.S. 564, 569-70 (1972). The opportunity to be heard at a meaningful time and in a meaningful manner includes (1) an impartial tribunal; (2) notice of the charges within a reasonable time before the hearing; and (3) absent emergency circumstances, a *pre-termination* hearing. *Miller v. City of Mission, Kansas*, 705 F.2d 368, 372 (10th Cir. 1983). In *Walker v. United States*, 744 F.2d 67, 70 (10th Cir. 1984), we recognized that "[w]hile not necessary in every case, 'procedural due process often requires confrontation and cross-examination of those whose word deprives a person of his livelihood,' " (quoting *Willner v. Committee On Character*, 373 U.S. 96, 103 (1963)).

Defendant Carl Smith informed Mr. Melton that he was being investigated, *inter alia*, because of accusations of perjury, both in a sworn affidavit and at trial. These charges were widely circulated in the media, due in part to defendant McBride's statements to the press confirming that Mr. Melton was under investigation and the nature of the charges, including perjury. Approximately three weeks later Mr. Melton was given three working-days' notice to appear at a meeting of the Disciplinary Review Board, and was told that "[y]our appearance before this board is as a result of the Departmental Internal Affairs investigation."

It is clear that plaintiff (and probably the public) understood that the Review Board would address both charges and provide Mr. Melton the opportunity to refute them. Yet, on the very morning of the hearing, Mr. Melton

was informed that he would not be allowed to address the perjury charge and that the Board would not consider the issue in its deliberations. Given the expectations created by the publicity concerning the perjury charge and the generalized nature of the stated reason for dismissal (violation of the Police Code of Ethics), it is reasonable to conclude that the public may have been left with the impression that Mr. Melton's dismissal was based in part upon the perjury charge.

Here, as in *Walker*, the employee's honesty and integrity were definitely called into question. The fact that the Board did not address the perjury issue in recommending his dismissal only compounded the problem because its refusal effectively precluded Mr. Melton from receiving the necessary name-clearing hearing. In addition, we believe that the perjury allegation was of a serious enough nature that at his hearing Mr. Melton should have been given the right to confront and cross-examine those who charged him with dishonesty. Under these circumstances, we cannot say that the trial court erred in instructing the jury that Mr. Melton was entitled to confront and cross-examine his accusers.

c. Instruction as to falsity element.

The City also objects to the liberty interest instruction on the basis that the court failed to instruct the jury that the disseminated information had to be *false* as well as stigmatizing. *Asbill v. Housing Authority of the Choctaw Nation of Oklahoma*, 726 F.2d 1499 (10th Cir. 1984). This objection was not properly made before the jury instructions were read to the jury as required by Rule 51, Fed. R.

Civ. P.[20] As a result, the matter was not properly preserved for appeal. We decline to reach it for that reason and because, in our view, no "plain error" was made.[21]

d. Sufficiency of the evidence to support the jury verdict: Evidence of economic damage.

As a final matter, the City claims that the jury verdict cannot stand because plaintiff did not show he was damaged as a result of the violation of his liberty interest.[22] While the City did not object to the jury instruction on this ground, nor raise this argument as a direct point of appeal, it is briefly discussed for the first time in the City's brief on appeal in the last two paragraphs of a related objection. *See* City's Brief in Chief, at 31-32.

The essence of the City's argument is that plaintiff failed to present evidence "that he was foreclosed from employment as a policeman because the reasons for his discharge." *Id.* at 32. The City misapprehends the legal

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[20] See *supra* note 15.

[21] We note that all along Mr. Melton has denied that he perjured himself in any way, and the evidence indicated that the City's own investigators declined to pursue this charge. This, while "falsity" as an express element of the liberty claim was not outlined in the jury instruction, we believe the matter was clearly before the jury.

[22] In reviewing the sufficiency of the evidence underlying a civil jury verdict, this court's review is "limited to the inquiry whether the record contains substantial evidence to support the jury's . . . conclusion, viewing the evidence in the light most favorable to the prevailing party." Kitchens v. Bryan County Nat'l Bank, 825 F.2d 248, 251 (10th Cir. 1987).

and factual bases for Mr. Melton's liberty claim. In *Paul v. Davis* the Supreme Court established that damage to reputation *alone* did not create a protectable liberty interest. Rather, there had to be a published stigmatizing statement *and* an attendant change in the individual's legal status, such as the "accompanying loss of government employment." 424 U.S. at 706, 710. Here there has clearly been the publication of a defamatory and stigmatizing statement accompanied by the loss of Mr. Melton's government employment, all without the opportunity for a name-clearing hearing. In addition, Mr. Melton also presented evidence that his options for future law enforcement-related employment (*e.g.* in the private security field) would likely be curtailed because of actions by the Police Chief which were expressly designed to accomplish that objective.[23] On this record we believe that Mr. Melton adequately stated a liberty interest under *Paul v. Davis*.

The dissent argues that the trial court committed "plain error" in its instruction on the liberty interest. *See post* at 18. However, the trial court's instruction is almost a direct restatement of our language in *Miller v. City of Mission*, 705 F.2d at 373, the only change being the substitution of the term "charges" for the *Miller* language on "reasons for dismissal." We have already discussed our views on this substitution, concluding that the change was appropriate. *See supra* at 23-24. Where the trial court has directly tracked our own language in its instruction, we cannot say this constitutes plain error.

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[23] *See* discussion *supra* concerning Mr. Melton's property interest in his status as a retired police officer.

III. Municipal Liability

A. Liability.

The preceding discussion establishes that Mr. Melton suffered at least two constitutional deprivations as a result of his dismissal from city employment. The next inquiry is whether, in light of the Supreme Court's decision in *City of St. Louis v. Praprotnik*, 108 S. Ct. 915 (1988), the unconstitutional action was taken pursuant to municipal policy sufficient to impose section 1983 liability upon Oklahoma City.

In *Monell v. New York City Dept. of Social Servs.*, 436 U.S. 658 (1978), the Supreme Court recognized that municipalities could be subjected to section 1983 liability if a deprivation of a federally protected right was caused by action taken "pursuant to official municipal policy of some nature. . . ." *Id.* at 691. Thus, "when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy inflicts the injury . . . the government as an entity is responsible under § 1983." *Id.* at 694.

Subsequently, in *Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986), the Court examined the circumstances under which a decision by municipal policymakers on a single occasion could nevertheless satisfy the "official policy" requirement of *Monell*. The *Pembaur* Court noted,

> a government frequently chooses a course of action tailored to a particular situation and not intended to control decisions in later situations. If the decision to adopt that particular course of action is properly made by that government's authorized decisionmakers, it surely represents

> an act of official government "policy" as that term is commonly understood. More importantly, where action is directed by those who established government policy, the municipality is equally responsible whether that action is to be taken only once or to be taken repeatedly.

475 U.S. at 481 (footnote omitted). The touchstone for determining "official policy" is "distinguish[ing] acts of the *municipality* from acts of *employees* of the municipality, and thereby mak[ing] clear that municipal liability is limited to action for which the municipality is actually responsible." *Id.* at 479-80 (emphasis in original). The Court equated municipal responsibility with the actions of a "final policymaker": "[M]unicipal liability under § 1983 attaches where – and only where – a deliberate choice to follow a course of action is made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question." *Id.* at 483-84.

The Court's recent decision in *Praprotnik* further defines the circumstances under which section 1983 liability will be imposed upon municipalities. A plurality of the Court held that a municipality can only be liable under section 1983 if the final policymaker, as identified by statute, is the one who takes the unconstitutional action. Moreover, in identifying "final" policymakers, courts must turn to state laws and local ordinances or regulations to determine where the statutory law places the responsibility for making law or setting policy in a particular area. The *Praprotnik* Court emphasized that this determination is a question of the law for the courts, not the jury.

Despite its "final policymaker" standard, the plurality in *Praprotnik* identified two situations where municipal liability nevertheless could be found even though the action is taken by an individual other than the "final policymaker": First, "egregious attempts by local government to insulate themselves from liability for unconstitutional policies" will be precluded if the plaintiff establishes "the existence of a widespread practice that, although not authorized by written law or express municipal policy, is 'so permanent and well settled as to constitute a "custom or usage" with the force of law.' " *Praprotnik*, 108 S. Ct. at 925-26 (quoting *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 167-68 (1970)). Second, if "a subordinate's position is subject to review by the municipality's authorized policymakers, . . . [and] the authorized policymakers approve a subordinate's decision and the basis for it, their ratification [will] be chargeable to the municipality. . . . " 108 S. Ct. at 926.

In applying these principles to the present case, we start by noting that, as an issue of law, this court can examine and determine the liability of Oklahoma City under the standard and considerations outlined in *Praprotnik*. Even though *Praprotnik* was decided after this trial and the parties did not have an opportunity to address this issue, we take judicial notice of the City Charter in order to proceed with our *Praprotnik* analysis.[24] *See Mills*

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[24] Section 3. The City Manager. The City Manager shall:

(a) Be the Chief Administrative Officer of the City and shall have charge and supervision of all branches of the City service, except as otherwise in this Charter provided.

. . . .

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v. Denver Tramway Corp., 155 F.2d 808, 812 (10th Cir. 1946) (appellate court has discretion to take judicial notice on its own accord).[25] We have considered whether the record

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(c) Appoint all officers and employees of The City of Oklahoma City except the elective officers and the officers whose election is vested in the Council by this Charter.

(d) *Dismiss any officer or employee appointed by him whenever, in his judgment, the interests of the City service so require.*

Additionally, art. III, § 1 of the Charter provides:

Section 1. Appointments and Promotions. Appointments and promotions in the classified service of the City shall be made according to merit and fitness, and removals and demotions shall be made solely for the good of the service.

[25] There seem to be two conflicting lines of cases in our circuit on the question of judicial notice of city ordinances. In Allred v. Svarczkopf, 573 F.2d 1146, 1151 (10th Cir. 1978), we took judicial notice of the city ordinances of Roosevelt City, Utah, and in Jackson v. Denver Producing & Refining Co., 96 F.2d 457, 460 (10th Cir. 1938), we took judicial notice of the Oklahoma City Charter and its provisions. However, elsewhere we have stated that "[i]n our Circuit, municipal ordinances may not be judicially noticed. . . . " Ruhs v. Pacific Power & Light, 671 F.2d 1268, 1273 (10th Cir. 1982) (quoting Dewell v. Lawson, 489 F.2d 877, 879 (10th Cir. 1974)). We believe that the better rule permits the appellate court to take judicial notice of matters "not subject to reasonable dispute in that [they are] . . . capable of accurate and ready determination by resort to sources whose accuracy cannot . . . reasonably be questioned." Fed. R. Evid. 201.

of this case provides a sufficient basis to make this determination. We have concluded that it does.

As *Praprotnik* instructs us, our analysis must begin with an examination of state law, including valid local ordinances and regulations, in order to find the "official or body that has the responsibility for making law or setting policy in any given area of a local government's business." *Id.* at 924-25. The City of Oklahoma City is a chartered city under the laws of the State of Oklahoma, operating under a Council-Manager form of government.

The City Charter makes clear that the City Manager is the "final policymaking authority" over employment decisions affecting City personnel. This section 1983 action was precipitated by the firing of Mr. Melton by the Chief of Police upon recommendation of the Disciplinary Review Board *and with the approval and concurrence of the City Manager*. The testimony indicated that Chief Gramling met with the City Manager and discussed the proposed dismissal of Mr. Melton. The City Manager expressly approved such dismissal. *See* Record, vol. 14, Transcript of Proceedings, at 878-79. Under the facts of this case, we are convinced that the City Manager ratified the Chief's actions within the meaning of *Praprotnik*.

We have already held that Mr. Melton was fired for exercising his First Amendment rights. In the process, he was also denied his liberty interest without due process. We now hold that the firing was done pursuant to a "municipal policy" which was ratified by the "final policymaking authority" as identified by state statute and local ordinance. Consequently, Oklahoma City is liable in

damages to Mr. Melton under section 1983 for the violation of his First Amendment rights and liberty interest without due process of law.[26] Our conclusion remains the same regardless of whether the jury predicated its finding of municipal liability on Mr. Melton's communication with Mr. Page's attorney, his testimony at trial, or both.

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[26] While not conclusive, the internal investigation which led to the forced retirement of the other officer who testified at the Page trial suggests the possibility that the City may have had a pattern or practice of subjecting individuals to retaliatory action because of their exercise of protected speech. Under *Monell*, such a pattern might also be sufficient to show the existence of an unconstitutional municipal policy giving rise to section 1983 liability.

In this case Mr. Melton showed, via the former officer's testimony, that someone else had apparently experienced retaliatory action after testifying at the Page trial *See* Record, vol. 11, Transcript of Proceedings, at 484-489. By contrast, in *Praprotnik* the plurality considered persuasive the fact that the plaintiff had never "attempt[ed] to prove that such retaliation was ever directed against anyone other than himself." 108 S. Ct. 926.

This case differs from many section 1983 actions because here the City does not disavow the actions of some of its employees as not being in keeping with official policy. Rather, it is the City's official litigation posture that it can discipline officers who disclose information gained in the process of being questioned as potential witnesses – without regard to whether or not the officers are acting in an official capacity. The City in effect argues that it *is* its policy to act in this manner. Thus, if Mr. Melton's actions were to be replicated by another officer, the City claims that the individual would be properly subject to discipline, including dismissal.

B. Damages.

The City also challenges as excessive the damages awarded by the jury to Mr. Melton. Specifically, the City claims that (a) the verdict form permitted damage awards to be "stacked," resulting in an insupportable total judgment;[27] (b) the court erred in its instruction by failing to require the jury to consider Mr. Melton's service pension in determining damages; and (c) plaintiff did not establish an entitlement to damages under the liberty interest claim because he failed to seek suitable employment.

With respect to all of the City's contentions, we noted earlier that defendants had made no effort to submit their own proposed jury instructions.[28] In addition, the City did not request special interrogatories to accompany the jury verdict form. Moreover, they raised no objections at trial which are relevant to their present claims. Because no attempt was made to properly raise these issues at the trial level or to preserve these alleged errors for appeal, we decline to reach them.

It has been our circuit's long-held position that "absent an award so excessive as to shock the judicial conscience and to raise an irresistible inference that passion, prejudice, corruption or other improper cause invaded the trial, the jury's determination of the damages is considered inviolate." *Malandris v. Merrill Lynch, Pierce,*

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[27] A review of the verdict form makes abundantly clear that the jury weighed each of the claims separately and gave them an individualized valuation. We find no merit in defendants' argument that the damages were "stacked".

[28] *See supra*, note 15.

Fenner & Smith, Inc., 703 F.2d 1152, 1168 (10th Cir. 1981) (en banc), *cert. denied*, 464 U.S. 824 (1983) (and cases cited therein). We do not find the award to be "so excessive as to shock the judicial conscience" nor do we consider the award to be a result of passion or prejudice. The damage award against the City stands.

IV. Immunity

We turn next to the issue of the individual defendants' liability for damages under section 1983. The jury awarded a total of $906,500 in actual damages and $28,200 in punitive damages against all but one of the individual defendants. The district court thereafter granted the defendants' Motion for Judgment N.O.V. on the issue of punitive damages.

The individual defendants challenge the jury's assessment of damages against them on two theories: First, that the suit was brought against them in their official capacity and therefore no individual liability should accrue. Second, if they are otherwise personally liable, they should be shielded by the qualified immunity recognized in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

The applicability of immunity defenses is a question of law. *Mitchell v. Forsyth*, 472 U.S. 511, 528 (1985). Consequently, this issue should not have been submitted to the jury. To the extent that the trial court may have erred in questions of law, this court reviews those issues *de novo*. *In re Ruti-Sweetwater, Inc.*, 836 F.2d 1263, 1266 (10th Cir. 1988). As a matter of law, we find that this was not solely an "official capacity" action.

A. Official-capacity.

In *Kentucky v. Graham*, 473 U.S. 159 (1985), the Court stated that where the complaint does not clearly specify whether officials are sued personally or in their official capacity, courts must look to "the course of proceedings" to determine the type of liability sought to be imposed. *Id.* at 167 n.14 (quoting *Brandon v. Holt*, 469 U.S. 464, 465 (1985)). This is one of those cases where ambiguous pleadings have required this court to closely examine the "course of proceedings" in order to determine the basis on which this suit was brought and litigated.[29] We conclude that while the action was brought against the individual defendants primarily for their actions in an official capacity, possible personal liability was also contemplated by all the parties at the time of trial.[30]

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[29] Here the caption of the pleadings did not specify on what basis the individual defendants were being sued, and the language of the complaint was ambiguous.

[30] In Kentucky v. Graham, 473 U.S. 159, 165-66 (1985), the Supreme Court summarized the differences between the two types of suits:

> Personal-capacity suits seek to impose personal liability upon a government official for actions he takes under color of state law. Official-capacity suits, in contrast, "generally represent only another way of pleading an action against an entity of which an officer is an agent." *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 690, n.55 (1978). As long as the government entity receives notice and an opportunity to respond, an official-capacity suit is, in all respects other than name, to be treated as a suit against the entity. It is *not* a suit against the official personally, for the real party in interest is the entity.

(citations omitted) (emphasis in original).

Consequently, we reject defendants' claim of no personal liability on the basis that this was solely an official-capacity suit.[31]

We find support for our conclusion from the record of the proceedings at the time the jury was receiving its instructions. Initially the court instructed the jury that "[u]nder the pleadings and the facts in this case, you must find against Oklahoma City anytime you find against any one of the individuals, because they were acting for the City, except punitive damages." Record, vol. 14, Transcript of Proceedings, at 994. The court characterized this instruction as one resulting from a "stipulation" by the parties. *Id.* at 997. However, defendants' counsel, who was representing both the City and the individual defendants, objected to the court's representation. In response to counsel's objection the court corrected its instruction, telling the jury to "judge Oklahoma City just like you would the individuals, whether it's liable or not liable, on that claim." *Id.* at 998. Counsel's objection effectively disavowed the City's automatic liability if the jury found against the individual defendants – the expected outcome if this were solely an official-capacity suit. Counsel's action can only be explained on the basis that he was proceeding under an assumption that the case also involved issues of personal capacity.[32]

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[31] We do not reach the issue of how the Supreme Court's decisions in *Pembaur* and *Praprotnik* would affect this case if it were solely an official-capacity action.

[32] In addition, at the close of plaintiff's case, defendants' counsel moved to dismiss with regard to the individual defendants on the basis of a good faith defense. It is obvious that

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B. Qualified immunity of individual defendants.

With respect to their second rationale for exoneration from damages, the individual defendants object to the jury instruction concerning good faith immunity on the basis that (1) the court applied an improper standard, and (2) that the instruction "presume[d] 'established law' without informing the jury as to what the law is." Record, vol. 14, at 1004.[33]

The qualified immunity of *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), shields "government officials performing discretionary functions . . . from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow*, 457 U.S. at 818. The key to the inquiry is the "objective reasonableness" of the official's conduct in light of the legal rules

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counsel was defending this case as *both* a personal-capacity and an official-capacity action.

[33] Appellants properly preserved the issue on appeal by raising the affirmative defense of good faith immunity at various stages of the proceedings. Initially the issue was raised in defendants' Answer and in the Pre-Trial Order. Counsel for the individual defendants also raised the defense in oral Motions for Directed Verdict at the close of plaintiff's case and then again at the close of all the evidence. Finally, defendants objected to the jury instruction on good faith immunity.

In this appeal most of the individual defendants also claim judicial and quasi-judicial immunity. However, this issue was not raised until defendants' Motion for Judgment N.O.V. We conclude that this issue was not properly preserved and we decline to reach it. *See* Fed. R. Civ. P. 51.

that were "clearly established" at the time the action was taken. *Id.*

Reliance on this qualified immunity standard should "permit the resolution of many insubstantial claims on summary judgment." *Harlow*, 457 U.S. at 818. However, this does not prevent defendants from raising the issue in the absence of a prior summary judgment motion. *See Rakovich v. Wade*, 850 F.2d 1180, 1204 (7th Cir.) (en banc), *cert. denied*, 109 S. Ct. 497 (1988).

1. Qualified immunity inquiry in a First Amendment context.

Determining whether a public employee has been discharged in violation of his First Amendment rights requires a case-by-case analysis: initially to determine if the speech was on a matter of public concern, and, secondly, to determine how the balancing of competing interests should be resolved in light of particular facts. *Pickering v. Board of Educ.*, 391 U.S. 563 (1968). We must now determine how the individualized nature of this inquiry can be reconciled with *Harlow*'s requirement that the law be "clearly established" before qualified immunity can be defeated.

The Fifth Circuit recently addressed this issue in *Noyola v. Texas Department of Human Resources*, 846 F.2d 1021 (5th Cir. 1988). In *Noyola*, a former employee of the Texas Department of Human Resources sued officials of the Department, claiming that he was fired for exercising his First Amendment right of freedom of speech. The Fifth Circuit held that the speech at issue was not protected. Even assuming *arguendo* that it was protected, the

officials were entitled to qualified immunity because the balancing process required by this type of case showed that "neither the 'contours' of [the employee's] rights were so clearly outlined nor was the 'unlawfulness' of terminating [him] so 'apparent' that [the officials] should forfeit their qualified immunity." *Id.* at 1026 (citing *Anderson*, 107 S. Ct. at 3039).

The Seventh Circuit has also recognized that:

> [T]here is one type of constitutional rule, namely that involving the balancing of competing interests, for which the standard may be clearly established, but its application is so fact dependent that the "law" can rarely be considered "clearly established." . . . With *Harlow*'s elimination of the inquiry into the actual motivations of the official, qualified immunity typically casts a wide net to protect government officials from damage liability whenever balancing is required.

Benson v. Allphin, 786 F.2d 268, 276 (7th Cir.), *cert. denied*, 107 S. Ct. 172 (1986) (footnote omitted) (cited with approval in *Rakovich*, 850 F.2d at 1213. In *Rakovich*, the complainant sued a police chief and police officers under section 1983 claiming that they had launched an investigation of him in retaliation for comments protected by the First Amendment. The Seventh Circuit held that the plaintiff had not shown that defendants retaliated against him for his protected speech. The court alternatively concluded that the officials had qualified immunity for conduct which, at the time of the alleged violation, did not violate clearly established law.

In *Roth v. Veteran's Administration*, 856 F.2d 1401 (9th Cir. 1988), the Ninth Circuit rejected the *Benson* analysis

on which *Rakovich* relied. *Roth* involved a suit by a physician and former employee of the Veteran's Administration medical center in San Francisco. Plaintiff sued his former superiors in their individual capacities, charging that they fired him in retaliation for his activities as a "whistleblower" in exposing "wastefulness, mismanagement, unethical conduct, violations of regulations, and incompetence . . . . " *Id.* at 1403.[34]

The Ninth Circuit held that Roth's speech was on a matter of public concern, 856 F.2d at 1406, and that factual disputes concerning the disruptive nature of Roth's statements precluded summary disposition. Defendants relied on the rationale of the Seventh Circuit's decision in *Benson* in arguing their entitlement to qualified immunity. The Ninth Circuit rejected that argument stating:

> If we accepted defendants' argument for a broader reading of *Benson*, we essentially would be holding that public employees can never maintain [an] action alleging retaliation for exercise of their first amendment rights because adjudicating these claims requires particularized balancing. We decline to adopt a rule that would effectively eviscerate whistleblower protection for public employees.

Id. The court noted that it and others had found the law to be established with sufficient clarity to deny

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[34] Although this case involves an action against federal, rather than state officials under § 1983, the actions are analogous for our purposes. *See* Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 403 U.S. 388 (1971) (violation of constitutional rights actionable against federal officials).

defendants the protection of qualified immunity at the summary judgment stage in cases comparable to Roth's. *Id.* at 1408.

We understand the concerns which prompted the Ninth Circuit's determination not to give *Benson* "a broader reading." These cases illustrate how difficult it is to apply *Harlow* in the setting of *Pickering* balancing. A simple black letter rule is not possible. What is clear is that *Harlow* places the presumption in favor of immunity for public officials acting in their individual capacities.[35] *Harlow* is intended as a shield against liability but cannot become an insuperable barrier; therefore, public officials lose immunity in the fact of clearly established law. However, because a rule of law determined by a balancing of interests is inevitably difficult to clearly anticipate, it follows that where *Pickering* balancing is required, the law is less likely to be well established than in other cases. We believe that except for case-by-case analysis and application, the rule cannot be better stated than in *Harlow* itself with careful consideration of its underlying principles.

In some circumstances, the fact-specific nature of the *Pickering* balancing may preclude a determination of "clearly established law," thereby giving rise to qualified immunity under *Harlow*. This is most likely to occur in situations where supervisors, in a reasonable and good-

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[35] *See* Malley v. Briggs, 475 U.S. 335, 341 (1986) (Qualified immunity "provides ample protection to all but the plainly incompetent or those who knowingly violate the law. . . . [If officials] of reasonable competence could disagree . . . , immunity should be recognized.").

faith exercise of their duties, discipline employees without the direction that would come through analogous cases.[36] We believe that the approach we adopt gives proper consideration to the concerns which prompted the Supreme Court to recognize qualified immunity, while it protects individuals from unprincipled behavior by a public employee's supervisors acting under color of law.

We now turn to the application of those principles to the facts before us. "Qualified immunity analysis requires the court to consider the operation of the rule in the context of 'the circumstances with which [the official] was confronted.' " *Giacalone v. Abrams*, 850 F.2d 79, 85 (2d Cir. 1988) (quoting *Anderson*, 107 S. Ct. at 3039).[37]

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[36] However, to the extent that courts in analogous (but not necessarily factually identical) cases have struck the necessary balance, government officials will be deemed "on notice" that their actions will be measured according to clearly established law and qualified immunity may not be available to them.

We also emphasize that our decision *does not* mean that only binding precedent will clearly establish a right. We assume that counsel for government entities remain abreast of the decisional law and periodically update responsible government officials so that their actions will be informed by, and will comport with, the law.

[37] The Supreme Court has warned that in determining whether the law was clearly established, a court should be careful not to test the rule of law at such a level of generality as to render unavailable the defense of qualified immunity. Anderson v. Creighton, 107 S. Ct. at 3038-39. Too general a formulation would

> convert the rule of qualified immunity that our cases plainly establish into a rule of virtually unqualified liability simply by alleging violation of extremely

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Consequently, our inquiry is: At the time these events took place, was the protected nature of Mr. Melton's speech sufficiently clear that defendants should have been reasonably on notice that the City's interest in its disciplinary rule would not survive a balancing inquiry?

This case presents an extremely close question as to whether the individual defendants are entitled to qualified immunity. Defendants should have been clearly on notice that Mr. Melton's trial testimony constituted protected speech under the First Amendment. *See Smith v. Hightower*, 693 F.2d 359 (5th Cir. 1982). In our mind, a reasonable official would have been on notice that the City's interest in the effective and efficient functioning of its enterprise *cannot* outweigh an employee's right (and a citizen's duty) to testify truthfully at trial. *See Reeves v.*

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> abstract rights. *Harlow* would be transformed from a guarantee of immunity into a rule of pleading. Such an approach, in sum, would destroy "the balance that our cases strike between the interests in vindication of citizens' constitutional rights and in public officials' effective performance of their duties," by making it impossible for officials "reasonably [to] anticipate when their conduct may give rise to liability for damages."

Id. at 3039 (quoting Davis v. Scherer, 468 U.S. 183, 195 (1984)). Conversely, structuring the inquiry too narrowly "would render the defense available to all public officials except in those rare cases in which a precedential case existed which was 'on all fours' factually with the case at bar." Dartlands v. Metropolitan Dade County, 681 F. Supp. 1539, 1546 (S.D. Fla. 1988). Thus, in phrasing the inquiry, courts must be careful to reach the proper level of concreteness without overly limiting the factual context.

Clayborne County Bd. of Educ., 828 F.2d 1096, 1100 (5th Cir. 1987) ("To allow a government employer to retaliate . . . against an employee's unfavorable trial testimony would undermine the ability of the witness to speak truthfully without fear of reprisal.") Therefore, under *Harlow* no immunity could exist for retaliatory action based on Mr. Melton's trial testimony.

We conclude, however, that defendants do enjoy qualified immunity to the extent that their liability is predicated on their recommendation of dismissal for Mr. Melton's *communications with defense counsel*. We have concluded that under *Pickering* the balance to be struck between the City's interest in smooth inter-governmental relations is outweighed by Mr. Melton's interest in speaking to defense counsel. However, the balancing of these competing interests would not have been so clear to a reasonable official under these circumstances that we can say it constituted "clearly established law" under *Harlow*. We cannot expect individual defendants to have understood at the time of Mr. Melton's discharge that it was unconstitutional to fire Mr. Melton for his communications with Mr. Page's counsel, particularly in view of their belief that this discussion constituted a breach of confidentiality.

We have ordered a new trial on Mr. Melton's claim that his trial testimony was a substantial or motivating factor in his dismissal from the Oklahoma City Police Department. If on retrial the jury so finds, the individual defendants *will not* be shielded by *Harlow* from personal liability for any damages which may be awarded on that basis. Because *Harlow* immunity shields the individual defendants from the alternative basis of First Amendment

liability (Mr. Melton's communications with defense counsel), no purpose would be served by a retrial on that basis since damages could not be collected.

2. Qualified immunity and deprivation of a property interest without due process of law.

We now examine whether Chief Gramling's deprivation of Mr. Melton's property interest in his status as a retired officer is protected by qualified immunity. This is a question of law which this court can address.[38] Our inquiry is whether it was clearly established law at the time the Chief acted that Okla. Stat. tit. 11, §§ 50-125 created a property interest that could not be deprived without affording Mr. Melton the right to be heard.

The right to due process whenever a property interest is impaired was established over fifteen years ago by the Supreme Court in *Board of Regents v. Roth*, 408 U.S. 564 (1972), and *Perry v. Sindermann*, 408 U.S. 593 (1972). In *Sindermann*, the Court recognized that " 'property' denotes a broad range of interests that are secured by 'existing rules or understandings.' A person's interest in a benefit is a 'property' interest for due process purposes

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[38] For reasons of judicial economy it makes sense for us to address this issue before a new trial is held; a determination by this court that qualified immunity is applicable would preclude Chief Gramling from the need to litigate the question of personal liability. Mitchell v. Forsyth, 472 U.S. 511, 526 (1985) (Qualified immunity is an "entitlement not to stand trial or face the other burdens of litigation which is 'effectively lost if a case is erroneously permitted to go to trial.' "). *See also Harlow*, 457 U.S. at 818 (dispose of qualified immunity issue at summary judgment stage if possible).

if there are such rules or mutually explicit understandings that support his claim of entitlement to the benefit . . . . " *Id.* at 601 (citation omitted). Here, a state statute, Okla. Stat. tit. 11, §§ 50-125, and the police department's own Operations Manual, outlined the basis of Mr. Melton's entitlement.[39]

Chief Gramling argues that he relied in good faith on the advice of municipal counsel in sending his letter to Mr. Melton, and, therefore, he should be absolved of any personal liability for the consequences of his actions. While superficially attractive, this argument proves too much. Adopting the proffered position would immunize officials from liability via the simple expedient of consulting counsel. In *Harlow,* the Supreme Court sought to protect officials in the good faith exercise of discretion in areas of the law which are not clearly charted. However, where the law is clearly established, there is no justification for excusing individuals from liability for their actions. In sum, officials are presumed to know and abide by clearly established law. When their actions are otherwise, their claims of qualified immunity will fail.

We conclude that Chief Gramling knew or should have known that under Oklahoma statute Mr. Melton had a property interest in his status as a retired police officer. According to the statute, it was clearly within the discretion of municipal officials to approve or deny Mr. Melton the right to "keep and bear firearms." However, the Chief's letter was designed to, and actually did, reach

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[39] As we stated earlier, Mr. Melton's property interest in his status as a retired officer was uncontested at trial and unchallenged on appeal.

beyond permissible limits by forbidding Mr. Melton from representing himself in any way as a retired member of the Oklahoma City police force. Chief Gramling deprived Mr. Melton of this property interest without notice or opportunity to respond. We hold that in so doing, Chief Gramling violated clearly established law and cannot claim the protection of qualified immunity on retrial.

3. Qualified immunity and deprivation of a liberty interest without due process of law.

We have long held that " '[t]he concept of liberty recognizes two particular interests of a public employee: 1) the protection of his good name, reputation, honor and integrity, and 2) his freedom to take advantage of other employment opportunities.' " *Weathers v. West Yuma County School Dist. R-J-1*, 530 F.2d 1335, 1338 (10th Cir. 1976) (quoting *Lipp v. Bd. of Educ.*, 470 F.2d 802 (7th Cir. 1972)). If the dismissal of a government employee implicates a liberty interest, the employee is entitled to a name-clearing hearing. *Miller v. City of Mission*, 705 F.2d at 373. Under *Anderson v. Creighton*, we must determine if the circumstances in this case were such that "reasonable official[s] would understand that what [they are doing] violate[d] that right." 107 S. Ct. at 3039. Thus our inquiry is whether it was "clearly established law" in 1983 that the public dissemination of unsupported perjury allegations, followed by a discharge, created enough of a stigma that Mr. Melton was entitled to a name-clearing hearing.

We conclude that the law in this area was clearly established, and that all but one of the individual defendants violated this right by failing to provide Mr. Melton

with the opportunity to address that charge in an appropriate way. With the exception of defendant McBride,[40] each of the other individual defendants was in a position to ensure that Mr. Melton received a name-clearing hearing. Specifically, defendant Maxwell as Chair of the Disciplinary Review Board should not have prevented Mr. Melton from addressing the perjury issue. In addition, each Board member was in a position to bring to the Chair's attention the need to provide such an opportunity in light of the public dissemination of the perjury charges. As the highest authority in the police department, defendant Gramling should have made sure that Mr. Melton received due process in this area. We affirm the award of damages on the liberty interest claim as to all defendants except defendant McBride.

V. Appeal on Cross Claims

Mr. Melton appeals the trial court's actions in (a) directing a verdict on his RICO claim, (b) instructing the

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[40] It is true that in his position as Public Information Officer Lieutenant McBride should be particularly sensitive to the potentially stigmatizing effect of the information he disseminates. Moreover, his actions arguably triggered the need for the name-clearing hearing. Nevertheless, it is clear that in a liberty-interest claim, liability accrues as a result of the failure to provide adequate procedural safeguards. Lieutenant McBride was not a participant in the deliberations of the Review Board; he was not in a position to ensure the provision of a name-clearing hearing; nor was he involved in the decision to discharge without due process. Consequently, we conclude that Lieutenant McBride was not a proper defendant on the liberty-interest claim.

jury concerning the section 1985 claim, and (c) striking the punitive damage awards.

A. RICO.

We find no merit in Mr. Melton's claim that the trial court erred in its handling of the RICO claim. It is true that the trial court improperly intimated that RICO was inappropriate because the actions of the Oklahoma City Police Department could not be likened to a "gangster situation." In *United States v. Turkette*, 452 U.S. 576, 585 (1981), the Supreme Court made clear that RICO "applies to both legitimate and illegitimate enterprises." However, we hold that in this case the trial court's misstatement constitutes harmless error. The plaintiff failed to establish the elements required for a RICO violation with respect to each defendant. Consequently, the district court properly refused to allow the RICO claim to go to the jury.

Mr. Melton alleged that defendants violated 18 U.S.C. § 1503, which prohibits actions in obstruction of justice. However, to establish this offense plaintiff must prove that each defendant had a specific intent to impede the administration of justice. *United States v. Carleo*, 576 F.2d 846 (10th Cir.), *cert. denied*, 439 U.S. 850 (1978). We find no evidence in the record to support such an intent. In our view, neither the Internal Affairs investigation of Mr. Melton nor the convening of the Disciplinary Review Board was undertaken with the intent to obstruct justice. Although we have held that Mr. Melton's dismissal and the circumstances attending it constituted a violation of his First Amendment and Due Process rights, that is a

significantly different proposition from intentional interference with the administration of justice. We hold that the trial court did not err in granting a directed verdict on the RICO claim.

B. Section 1985 claim.

The essence of plaintiff's objection is that the trial court refused to adopt the wording in plaintiff's proposed instruction. It is well established that although " 'a party is, upon proper request, entitled to an instruction upon his theory of the case if there is evidence to support it, a party is not entitled to have the jury instructed in the particular language of its choice.' " *United States v. Stallings*, 810 F.2d 973, 977 (10th Cir. 1987) (quoting *Wegerer v. First Commodity Corp.*, 744 F.2d 719, 723 (10th Cir. 1984) (citations omitted)).

We have reviewed the instruction at issue and conclude that it was not erroneous as a matter of law. While the instruction may not have been as specific in its application of the law to the facts as plaintiff desired, the instruction correctly stated the law. We do not believe the instruction, as given, mislead or confused the jury. We also find no merit in plaintiff's contention that the trial court erred in failing to direct a verdict for plaintiff on the section 1985(2) claim.

C. Punitive damages.

We have already held that, with some exceptions, the individual defendants are entitled to the qualified

immunity protection provided by *Harlow*.[41] Since good faith immunity precludes liability for actual damages, we find no basis for a punitive damage award on the First Amendment claim. *Cf. Lavicky v. Burnett*, 758 F.2d 468, 477 (10th Cir. 1985), *cert. denied*, 474 U.S. 1101 (1986) (no punitive damage award where issue should not have been submitted to jury in the first place).

With respect to the property interest claim (retired officer status), we have held that only the City and Chief Gramling must face a new trial on this issue. Because the other individual defendants were not parties to the deprivation of plaintiff's property interest in his status as a retired officer, they, of course, cannot be liable for punitive damages.

Liability for punitive damages can only be found, if at all, against Chief Gramling for the deprivation of plaintiff's property interest and against the individual defendants who contributed to the deprivation of Mr. Melton's liberty interest. Just because public officials make mistakes in judgment in the performance of their duties sufficient to subject them to liability for actual damages does not automatically create a basis for a

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[41] We have found that certain individual defendants are not qualifiedly immune for the violation of Mr. Melton's liberty interest. Chief Gramling is likewise not immune with respect to the issue of the plaintiff's property interest in his status as a retired officer. We have remanded for a new trial on the basis of First Amendment liability. Depending on the outcome of the new trial, defendants may not be qualifiedly immune on the First Amendment-trial testimony claim.

punitive award. The standard for the award of punitive damages is whether defendants acted with ill will, desire to injure, reckless indifference, or malice. *Lavicky*, 758 F.2d at 477. Our review of the record does not show such malice, ill will, or reckless disregard for Mr. Melton's rights as to meet this standard. For example, it is clear that when Mr. Melton's reputation was stigmatized by dissemination of the perjury charges, defendants should have afforded him a name-clearing hearing. However, we do not discern any malice in the Review Board's refusal to address the perjury charge. If anything, it was probably an effort to not base disciplinary action on the unproven allegations of a third party.

Therefore, at most, the impairment of Mr. Melton's liberty interest arose from the officials' lack of familiarity with due process requirements. However, "[o]fficials cannot be held for punitive damages simply because they did not know the rules of conduct they should follow. Simple ignorance of the applicable legal rules, even arrogant ignorance, does not by itself indicate reckless or callous indifference to federally protected rights." *Lavicky*, 758 F.2d at 477. In light of the governing standard and the facts of this case, we hold that the trial court did not err in granting judgment n.o.v. on the issue of punitive damages.

VI. Attorney's Fees

Finally, we address defendant Carl Smith's claim that he is entitled to attorney's fees pursuant to 42 U.S.C. § 1988 (1982) as a prevailing defendant.

The Supreme Court has stated that "[a] prevailing defendant may recover an attorney's fee only where the suit was vexatious, frivolous, or brought to harass or embarrass the defendant." *Hensley v. Eckerhart*, 461 U.S. 424, 429 n.2 (1983). The decision to award or deny attorney's fees lies within the sound discretion of the court. On appeal, review is subject to an abuse of discretion standard. *Supre v. Ricketts*, 792 F.2d 958, 961 (10th Cir. 1986).

Defendant Smith offers little more than conclusory statements in support of his claim that plaintiff's action against him was frivolous and maintained in bad faith. The sheer length of this opinion should suggest that the issues raised by plaintiff in his lawsuit were not frivolous. Moreover, on this record we cannot say that plaintiff's interest in maintaining the lawsuit against Lieutenant Smith was in any way based on intent to harass or embarrass the defendant. We hold that the district court did not abuse its discretion in denying Lieutenant Smith's request for attorney's fees.

VII. Summary

This case has raised a number of troublesome issues which have required detailed analysis. To assist the trial court's disposition on remand, we summarize our conclusions as follows:

1. Mr. Melton's speech-related activities were protected under the First Amendment, and his dismissal for the exercise of his constitutional right was unwarranted and improper. However, because the jury instruction on the First Amendment claim improperly combined two

bases of liability and did not include a full *Mt. Healthy* inquiry on Mr. Melton's claim that his trial testimony was a substantial or motivating factor in his dismissal, we reverse the jury verdict and remand for a new trial.

2. Mr. Melton was afforded adequate due process with respect to his property interest in continued employment.

3. Mr. Melton was *not* afforded *any* due process prior to the termination of his statutorily-created property interest in his status as a retired police officer.

4. Because the jury instruction on property interest-due process improperly combined two bases for liability, one of which was unsupported by the evidence, we reverse the jury verdict and remand for a new trial. On retrial the trial court must determine whether Oklahoma City is liable under *Praprotnik* for Chief Gramling's actions, and the jury must determine the damages to be assessed against Chief Gramling. The trial court shall direct a verdict for *defendants* on the property interest in continued employment claim. The trial court shall direct a verdict for *plaintiff* on the property interest in retirement status claim.

5. Mr. Melton was deprived of his liberty interest without due process of law, and the City as well as all of the individual defendants except for Lieutenants Smith and McBride are personally liable in damages to the plaintiff. The law with respect to liberty interest-due process *was* clearly established, so the individual defendants cannot be protected from personal liability under *Harlow*.

6. Mr. Melton's dismissal for his First Amendment-protected speech, and the violation of his liberty interest without due process, were unconstitutional actions taken pursuant to municipal policy or ratified by the final policymaking authority as identified by statute and ordinance. Consequently, the City of Oklahoma City is liable in damages to Mr. Melton on these two claims.

7. The jury verdict on actual damages was not excessive nor improper.

8. This action was *not* brought solely as an official capacity action, which would shield the individual defendants from personal liability. Even assuming that the parties initially litigated the case in that posture, defendants' counsel effectively disavowed the City's automatic liability under official capacity, thereby exposing the individual defendants to personal liability.

9. We hold that *Harlow* immunity protects the individual defendants from personal liability on the claim that Mr. Melton was discharged for his communications with Mr. Page's counsel.

10. If, in a new trial, the jury finds that Mr. Melton's *trial testimony* was a substantial or motivating factor in his dismissal, then they shall determine his damages and *Harlow* immunity will *not* protect the individual defendants.

11. On retrial, Chief Gramling will not be protected by good faith immunity on plaintiff's property interest claim with respect to his status as retired officer.

12. The trial court did not err in directing a verdict for defendants on Mr. Melton's RICO claim.

13. The trial court did not err in its instruction to the jury concerning the section 1985(2) claim.

14. The trial court did not err in granting judgment n.o.v. for defendants on the punitive damages issue.

15. The trial court did not abuse its discretion in denying defendant Smith's request for attorney's fees.

AFFIRMED in part, REVERSED in part, and REMANDED for a new trial on (1) the City's and Chief Gramling's liability on the deprivation of Mr. Melton's property interest (in his retired officer status) without due process of law, and (2) the individual defendant's liability under Mr. Melton's claim that his trial testimony was a substantial or motivating factor in his dismissal.

Nos. 85-1738, 85-1739, 85-1740, 85-1741, 85-1742, & 85-1811 Melton v. City of Oklahoma City

BALDOCK, Circuit Judge, concurring in part and dissenting in part.

On September 13, 1983, Police Chief Lloyd Gramling, with the approval of City Manager Carl Johnson, relieved Lieutenant R.J. Melton of his duties with the Oklahoma City Police Department. Melton was terminated after nearly twenty-one years of loyal service for violating a portion of § 1.01 of the police department's operation manual: "Whatever I see or hear of a confidential nature or that is confided to me in my official capacity will be kept ever secret unless revelation is necessary in the performance of my duty." Relying on the findings of an internal affairs investigation commenced August 1, 1983, a Disciplinary Review Board concluded that Melton

improperly had provided a tape recording of a confidential communication between himself and an assistant U. S. attorney to defense counsel of Judge William Page. Judge Page, a friend of Melton for whom Melton testified at trial, was convicted of racketeering and extortion on July 29, 1983. *United States v. Page*, No. CR-83-73-R (W.D. Okla. filed April 6, 1983), *aff'd*, 808 F.2d 723 (10th Cir.), *cert. denied*, 482 U.S. 918 (1987).

Following his discharge, Melton instituted this suit on January 9, 1984, against Oklahoma City and various law enforcement officials connected with the incident, alleging (1) a deprivation of his free speech and due process rights in violation of 42 U.S.C. § 1983, (2) a conspiracy to retaliate against him for testifying on behalf of a defendant in a federal criminal proceeding as proscribed by 42 U.S.C. § 1985(2), and (3) a pattern of racketeering designed to impede the administration of justice in contravention of 18 U.S.C. §§ 1964 & 1503. On February 4, 1985, a jury rendered a general verdict for Melton in the amount of $1,272,000 on his free speech and due process claims, but returned a verdict in favor of the defendants on his conspiracy theory. The district court struck a $28,200 punitive damage award in Melton's favor and directed a verdict for the defendants on his racketeering charge. The motion for attorney's fees under 42 U.S.C. § 1988 of internal affairs investigator Carl Smith, the only defendant exonerated on each of Melton's allegations, was denied. These six consolidated appeals ensued.

The court has delivered a thorough opinion, sorting out the myriad of difficult questions involved, and I join

in the court's disposition of the official-capacity immunity, racketeering, conspiracy, punitive damages, and attorney's fees issues contained in parts IV-A, V and VI. But much of the court's approach to the defendants' asserted liability under the free speech and due process provisions of our Constitution is overly broad, failing to find support in the record or binding precedent. The record certainly reveals a harsh treatment of Melton, seemingly unwarranted when his "misconduct" is weighed against his lengthy and unblemished service to the police force. But unfortunately, law and justice are not always coextensive. Consequently, the salient issue is not whether the firing of Melton was unfair, but whether the firing of Melton was contrary to law, and whether that violation of law reached constitutional dimensions.

I

The court first undertakes an analysis of Melton's claim that the defendants deprived him of his first amendment right to freedom of speech when they allegedly discharged him on the basis of his (1) trial testimony in favor of Judge Page, and (2) disclosure of a communication with the government to Judge Page's defense counsel. *Mt. Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977), established a three-prong test to determine whether a governmental entity's decision to discharge an employee contravenes the employee's first amendment guarantees. The employee must initially show as a matter of law that the speech at issue deserves constitutional protection. The court in this instance correctly points out that this inquiry involves two steps: Whether the speech constitutes a matter of

public concern, and, if so, whether the employee's interest in making the statement outweighs "the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering v. Board of Educ.*, 391 U.S. 563, 568 (1968). If the speech is worthy of protection, the employee then has the burden of proving as a factual matter that the protected speech was a "motivating factor" in the detrimental employment decision. *Mt. Healthy*, 429 U.S. at 274. Lastly, if the employee establishes his case, the employer must be given an opportunity to persuade the jury that it would have reached the same decision in the absence of the protected activity. *Id. See generally Koch v. City of Hutchinson*, 847 F.2d 1436, 1440 n.11 (10th Cir.) (en banc), *cert. denied*, 109 S. Ct. 262 (1988).

A.

Accepting the propriety of the court's conclusion that Melton's trial testimony was a matter of public concern which outweighed Oklahoma City's interest in the effective functioning of its police department, the record contains evidence insufficient for any reasonable jury to conclude that Melton's trial testimony was the "motivating factor" or cause for his discharge. The letter of September 13, 1983, from Police Chief Gramling to Melton concerning the reason for the discharge makes no reference to the trial testimony, but rather refers only to the tape recorded conversation Melton furnished Judge Page's defense. Gramling testified that Melton could not be terminated for testifying at Page's trial. Rec. vol. XIV, at 877. Melton's expert, Dr. George Kirkham, testified that the action taken against Melton was not based on his

appearance as a trial witness. *Id.* vol. XI, at 554-55. Furthermore, the testimony of Melton himself along with members of the review board unequivocally indicates that Melton's appearance on behalf of Judge Page had nothing to do with his discharge. *E.g., id.* vol. X, at 253, vol. XIII, at 746, 829.

As the court notes, defense counsel did a less than desirable job throughout the trial of preserving error by contemporaneous objection. *See* Fed. R. Evid. 103 (rulings on evidence generally may not be assigned error unless brought to the attention of the trial judge); Fed. R. Civ. P. 51 (party generally may not assign error to an instruction unless objection is made prior to jury deliberation). Nevertheless, instruction five in my estimation is plain error. Despite the absence of evidence sufficient to carry Melton's burden, that instruction permitted the jury to find Melton's appearance as a defense witness for Judge Page a motivating factor in the defendants' decision to terminate Melton. This is a "particularly egregious error" which justifies invoking the plain-error exception to the contemporaneous objection rule. "[A] miscarriage of justice would otherwise result." *United States v. Young*, 470 U.S. 1, 15 (1985). *See also Corriz v. Naranjo*, 667 F.2d 892, 901 (10th Cir.) (Doyle, J., specially concurring) (instructions not properly objected to at trial to be reviewed where error may well have been a generating factor which culminated in unwarranted verdict or where a "miscarriage of justice may occur"), *cert. dismissed*, 458 U.S. 1123 (1982); 1 S. Childress & M. Davis, *Standards of Review* § 4.3 at 241-42 (1986) (federal appeals courts have fashioned a plain error exception in both criminal and civil cases by which to review unpreserved errors for a

miscarriage of justice). Because no reasonable jury could find that Melton's testimony was the cause of his discharge on the evidence before it, the district court erred in failing to grant judgment to defendants on that point as a matter of law. No triable issue of fact is present if the evidence is so one-sided as to make a verdict for the opposing party impossible. *See Missouri Pac. R.R. Co. v. Kansas Gas & Elec. Co.*, 862 F.2d 796, 800 (10th Cir. 1988).

B.

The constitutional ramification of Melton's disclosure to Page's defense counsel of the recorded conversation between himself and an assistant U. S. attorney are more troublesome. No doubt that disclosure was the "motivating factor" in Melton's discharge; the defendants so admitted throughout the trial. *E.g.*, Rec. vol. XII, at 660-61, vol. XIII, at 753. Problems arise, however, with regard to the protected status of this speech. Ultimately though, my concerns relate not to the court's result on this issue, but rather to the court's overbroad application of first amendment doctrine.

Whether Melton's speech addresses a matter of public concern depends on the content, context, and form of the conversation as revealed by the entire record. *Connick v. Myers*, 461 U.S. 138, 147-48 (1983). In *Koch*, 847 F.2d at 1445, we recently recognized that "[a]fter *Connick*, many courts have particularly focused on the extent to which the content of the employee speech was calculated to disclose wrongdoing or inefficiency or other malfeasance on the part of government officials in the conduct of their official duties." Speech which may be of general interest

to the public is not automatically afforded first amendment protection. *Wilson v. City of Littleton*, 732 F.2d 765, 769 (10th Cir. 1984). More recently, in *Conaway v. Smith*, 853 F.2d 789, 796 (10th Cir. 1988), we emphasized that in analyzing whether speech constitutes a matter of public concern, the focus is on the motive of the speaker, "*i.e.*, whether the speech *was calculated* to disclose misconduct or dealt with only personal disputes and grievances with no relevance to the public interest." (emphasis in original).

In this case, the evidence shows that the government had interviewed Melton as a potential defense witness because he was a friend of Judge Page. Rec. vol. X, at Ill. Melton informed an assistant U.S. attorney that monies Page received from a government informant may have been legitimate. Moreover, Melton directly placed the informant's credibility into question. *See id.* at 182-220 (transcript of taped conversation). Melton, however, recorded the interview for a purely private purpose. As a friend of Page, Melton believed he (Melton) was under surveillance and did not want to risk being misquoted. *Id.* at 110, 113, 182. Subsequently, Page's defense counsel asked Melton to appear as a character witness for the judge. During a discussion a few days before trial, defense counsel first became aware of the recording. *Id.* at 69-72. Melton allowed counsel to review the tape and prepare for Melton's signature an affidavit in support of a motion to dismiss the charges against Page based upon the government's failure to comply with *Brady v. Maryland*, 373 U.S. 83, 86-88 (1963) (prosecution's suppression of evidence favorable to an accused who has requested it

violates due process), in violation of a court order. The trial judge in the Page prosecution denied the motion.

Notwithstanding the ruling of the trial judge in the Page prosecution, the district court in this case concluded that the information Melton provided the government was Brady material which the prosecution was obligated to give to the defense; and the court so instructed the jury in instruction five: "You are told that as a matter of law the conversation between the plaintiff and Prosecutor Fredenburg contained 'Brady' information that the prosecutor was obligated under court order to turn over to defense counsel in the Page case." Why defendants' counsel in this case did not press the prior court's ruling before the jury in view of Melton's continual references to a *Brady* violation in the Page prosecution, and why the district court declined to defer to the prior court's decision, remain unanswered. But because Melton was not a party or privy to the Page trial, he was not precluded from raising the issue anew in this case. *See generally* 18 C. Wright, A Miller & E, Cooper, *Federal Practice and Procedure* §§ 4448-49 (1981).

Melton's tape recording at least arguably contained colorable *Brady* material to which Page's defense was entitled. This conclusion alone, however, does not entitle Melton's actions to constitutional protection. We must still ask whether Melton disclosed the tape merely to help a friend in trouble – a purely private motive – or to disclose malfeasance on the part of the prosecution – a matter of public concern. Although the record provides no sure answers, Melton's testimony leads me to believe the latter:

Melton: I was asked about taking any notes first and I advised him no, I had not. And then he asked me if I had taped it, and I said yes, I did.

Counsel: Did he advise you or talk to you? Do you remember him talking to you about the Brady rule and the prosecutor and law enforcement's responsibility thereunder?

Melton: Yes, sir, he did. And I was somewhat familiar with Brady material prior to him discussing it with me, anyway.

Counsel: What was your state of mind? What did you think the obligation was under Brady at that time?

Melton: Well, one was it very explicit, that the prosecutor does turn over any information to the defense attorney. Whether requested or not, they're supposed to do it. That is the law, as I understand it, and as I understood it at the time talking to Mr. Goetcher [Page's defense counsel]. Mr. Goetcher reaffirmed this. And there were other considerations that were made in turning over the tape to the defense, not just based upon Brady. That was my biggest concern.

Counsel: What were the others?

Melton: The one was that it would show beyond a reasonable doubt in anyone's mind that I did, in fact, have an interview with Wes Fredenburg [assistant U. S. attorney], he no doubt whatsoever.

The second being that I had a moral obligation under my Code of Ethics to protect the innocent against deception, and also to – I can't quote – right not I can't quote the Code of Ethics verbatim. But I did have this obligation under the first part of my Code of Ethics of duty.

> I had no problem with turning over this tape to the U.S. Attorney on this. Also, it is a state and a federal law that if you have information regarding a case, that it doesn't make any difference whether it's for the defense or for the prosecution, and you're asked to supply that information, if you don't turn it over, you could be filed on in Court in a criminal action.
>
> Counsel: Were you concerned about a possible obstruction?
>
> Melton: I was concerned with that. I didn't want to get caught up in an obstruction of justice charge.

Rec. vol. X, at 120-21. This conversation leads to the court's justifiable conclusion that Melton's concern in disclosing the tape was public. Unlike the plaintiff in *Connick*, 461 U.S. at 148, Melton was seeking to provide exculpatory information which he believed it was his ethical duty to disclose and which the prosecution had not yet disclosed to defense counsel. Consequently, Meltons actions served to inform, albeit indirectly, the public that the prosecution may not have been fully discharging its responsibilities. But the inference contained in the court's opinion, slip op. at 9, that "information relating to a public official's guilt or innocence" is necessarily a matter of public concern is impermissibly overbroad. The proper focus must remain principally upon the motive of the speaker. *Conaway*, 853 F.2d at 796-97; *Koch*, 847 F.2d 1445-47.[1]

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[1] The form and context of Melton's speech likewise fall within the realm of "public concern." In *Rankin v. McPherson*, 107 S. Ct. 2891, 2898 (1987), the Supreme Court found that

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Having determined that Melton's disclosure of the recorded conversation constituted a matter of public concern, the court next balances Melton's interest in relinquishing the tape with the state's interest in preserving a harmonious and effective police force, and concludes that "the City failed to make its case." Slip op. at 14. In so doing, the court purports to establish a rule that "the government must introduce evidence of an *actual* disruption of its services resulting from the speech at issue." *Id.* (emphasis added). Such a rule, however, is absolutely contrary to Supreme Court precedent. As an inferior federal court, we therefore are not empowered to make such a sweeping pronouncement. *See Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring) ("We are not final because we are infallible, but we are infallible only because we are final").

In *Connick*, the plaintiff, an assistant district attorney, circulated a office questionnaire asking, among other

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plaintiff's private statement to a coworker nonetheless addressed a matter of public concern. Similarly, Melton's failure to express his concerns in a public forum does not remove them from first amendment protection. *Conaway*, 853 F.2d at 797.

The record reveals that the defendant's main objection to Melton's speech was its recorded nature. No one contested Melton's right to tape record his conversation with the prosecution or speak with defense counsel. Melton's death knell sounded when he handed over the purportedly confidential tape to Page's defense counsel. *See* Rec. vol. XII at 660-61, XIII, at 752-53. Any reason, however, for affording a tape recording any less protection than simple recollection, written notes or the like escapes me.

things, whether the employees felt pressure from their superiors to work in political campaigns. The Court specifically rejected the view that once speech was held to be a matter of public concern, the government had the burden to "clearly demonstrate" that the speech "substantially interfered" with departmental operations. *Connick*, 461 U.S. at 150. Instead, "the State's burden in justifying a particular discharge varies depending upon the nature of the employee's expression." *Id.* The Court continued:

> When close working relationships are essential to fulfilling public responsibilities, a wide degree of deference to the employer's judgment is appropriate. Furthermore, we do not see the necessity for an employer to allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action. We caution that a stronger showing may be necessary if the employee's speech more substantially involved matters of public concern.

Id. at 151-52. The Court concluded that plaintiff's first amendment interest did not require the district attorney to "tolerate action which he *reasonably believed would disrupt* the office, undermine his authority, and destroy close working relationships." *Id.* at 154 (emphasis added). Proof of actual disruption was unnecessary.

Admittedly, in *Rankin*, 107 S.Ct. at 2899, and *Pickering*, 391 U.S. at 570-71, the Court, while holding in favor of the employees, noted the respective employers' failure to present any evidence of office disruption. But these passing references to the employers' lack of evidence is a far cry from the judicial affirmation which the court today makes it out to be. In *Koch*, 847 F.2d at 1452 n.22,

we emphasized the "heightened governmental interest in maintaining harmony among employees in the law enforcement context, where '[mutual] trust and respect among [employees] . . . are particularly important' and '[t]he need for confidentiality cannot be gainsaid.' " (quoting *Egger v. Phillips*, 710 F.2d 292, 319 (7th Cir.), *cert. denied*, 464 U.S. 918 (1983)). *Accord Conaway*, 853 F.2d at 798. Despite the court's contrary implication in this case, *Connick* binds us: The extent of the government's burden depends on the nature of the employee's speech. *Connick*, 461 U.S. at 152.

While recognizing in this case the police department's interest in preventing disruption to the close working relationship between law enforcement officials and prosecutors so vital to the administration of the criminal justice system, the first amendment rights of an employee seeking to ensure that the ends of justice are met by revealing evidence tending to exonerate a criminal defendant cannot be disregarded. As we recently stated in *Conaway*, 853 F.2d at 798: "It would be anomalous to hold that because the employee's whistle blowing might jeopardize the harmony of the office or tarnish the integrity of the department, the law will not allow him to speak out on his perception of potential improprieties. . . . " Moreover, Melton did not voice his concerns to the media, but to an attorney. Any disruption to the Oklahoma City Police Department most likely resulted from its own publication of the charges against Melton. *See id.* at 798-99. Finally, the police department was not officially involved in the investigation of Judge Page. Rather, the investigation was solely a federal matter in which Melton played no official role. Considering all

these factors, I am constrained to agree with the court's conclusion that Melton's first amendment interest in disclosing the recorded conversation outweighs the governmental interest at stake in this instance.

II.

In contrast, the court's approach to Melton's claim that the defendants deprived him of property without due process of law in violation of the fourteenth amendment is wholly unacceptable. Before government employees are entitled to a pretermination hearing, they must first establish the presence of an interest protected by the Constitution:

> A public employee facing discharge is entitled to the safeguards of procedural due process only if he can demonstrate that the termination implicates a property or liberty interest protected by the Due Process Clause; if a property or liberty interest is not implicated, he must settle for whatever procedures are provided by statute or regulation.

Sipes v. United States, 744 F.2d 1418, 1420 (10th Cir. 1984). *See also Rosewitz v. Latting*, 689 F.2d 175, 177 (10th Cir. 1982) ("normally the issue of whether the plaintiff has a property interest protected by the fourteenth amendment is dispositive"). In *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972), the Supreme Court explained that to have a property interest in a benefit, an individual must enjoy "a legitimate claim of entitlement to it," rather than a mere "unilateral expectation of it."

A.

Melton first asserts he was denied a property interest in his continued employment with the police department. Although ultimately concluding that Melton received the process due him under the standards set forth in *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985), the court first determines that "the trial court did not err in ruling that Mr. Melton had a valid property interest in his continued employment." Slip op. at 20 n.15. The determination of whether Melton had a property interest in continued employment is a question of state law. *Bishop v. Wood*, 426 U.S. 341, 344 (1976). Melton's situation is directly controlled by our recent decision in *Graham v. City of Oklahoma City*, 859 F.2d 142 (10th Cir. 1988). Therefore, the court need not reach the question of "what process is due."

In *Graham*, an Oklahoma City police officer filed suit against the City and Chief Gramling alleging, among other things, that his termination for purportedly filing a false police report deprived him of a property interest in employment without due process. We held that Graham did not possess a property interest under Oklahoma law because the Oklahoma City Charter grants "all power to discipline and discharge city employees to the city manager and specifically states 'removals and demotions shall be made solely for the good of the service.' " *Id.* at 146. Relying on *Umholtz v. City of Tulsa*, 565 P.2d 15 (Okla. 1977), we rejected, as the court must here, the argument that the Police Department Operations Manual created a property interest by providing for discharge only for cause. In *Umholtz*, the Oklahoma Supreme Court held the discipline procedures set forth by the police department

did not legally affect the specific powers granted under the city charter. *Id* at 22. *See also* 11 Okla. Stat. § 1-102(1) ("Once a municipal charter has been adopted and approved, it becomes the organic law of the municipality in all matter pertaining to the local government of the municipality and prevails over state law on matters relating to purely municipal concerns"). This case is indistinguishable from *Graham*. As we reasoned there, the Oklahoma City Charter is simply not sufficient to provide Melton a legitimate claim of entitlement to continued employment. *Graham*, 859 F.2d at 146.

B.

Nor am I prepared to accept the court's cursory conclusion that Melton had a property interest in his status as a retired police officer. Presumably, the provisions of the Oklahoma Municipal Police Pension and Retirement System, 11 Okla. Stat. §§ 50-101 to 50-136.1, govern Melton's involuntary retirement. The court reasons that § 50-125 establishes a protected interest for Melton as a retired police officer. Slip op. at 23. That section reads in relevant part:

> Members retired under the provisions of this article *may* retain their status as peace officers of the State of Oklahoma, retired, and as such *may* retain the right to keep and bear firearms *when approved by the officials of the municipality of retirement*.

11 Okla. Stat. § 50-125 (emphasis added).

Contrary to the court's dubious construction, the plain language of § 50-125 indicates that whether retired officers "may retain" their status as peace officers and

their right to possess firearms is entirely within the discretion of their superiors. Additionally, neither the court nor Melton point to any rule or regulation which entitles him to wear his police uniform in security-type employment. Consequently, under Oklahoma law, Melton has no legitimate claim of entitlement to, and *a fortiori* no property interest in, any status as a retired police officer.

III.

Melton likewise fails to prove under the applicable legal standard that defendants deprived him of a liberty interest without due process of law. In *Paul v. Davis*, 424 U.S. 693, 712 (1976), the Supreme Court held that an individual's interest in a good name or reputation alone does not constitute liberty within the meaning of the fourteenth amendment. In *Asbill v. Housing Auth.*, 726 F.2d 1499, 1503 (10th Cir. 1984), we later noted:

> In a series of cases, the [Supreme] Court has held that for an employee to make a successful liberty deprivation claim she must show that her dismissal resulted in the *publication* of information which was *false* and *stigmatizing* – information which had the general effect of curtailing future freedom of choice or action.

(emphasis in original). Nevertheless, the court today erroneously holds that the police department's publication alone of perjury charges against Melton, subsequently dropped, impaired his "liberty interest in good name and reputation." Slip op. at 26.

The perjury charges initially leveled against Melton and never publicly retracted may very well have had a stigmatizing effect upon him. But after his discharge,

Melton apparently did not seek further employment as a police officer, and thus could only surmise that he could not obtain like employment. *Cf.* rec. vol. X, at 163-64. In *Conaway*, 853 F.2d at 789, we stated that "[a]bsent any evidence that Conaway's attempts to obtain other employment have been hindered by the charge of insubordination, we find that no protected liberty interest was infringed." Similarly, in *Ewers v. Board of County Comm'rs*, 802 F.2d 1242, 1249 (10th Cir. 1986), *reh'g granted on other grounds*, 813 F.2d 1583 (1987), *cert. denied*, 108 S. Ct. 704 (1988), "we h[e]ld that Ewers failed to establish that the accusations stigmatized him in that they had the general effect of curtailing his future freedom of choice with regard to employment opportunities." These cases control this situation. Melton has not proven the defendants' deprived him of liberty; at most, he has stated a state law action in defamation.

Even assuming, however, that Melton proved stigmatization, the most to which he is entitled on the liberty issue is a new trial. The district court charged the jury in instruction seven that "[w]hen the termination is accompanied by public dissemination of the charges against him, and those charges would stigmatize the employee's reputation *or* foreclose future employment opportunities, due process requires that that employee be provided . . . an opportunity to clear his name." (emphasis added). Under *Paul* and its progeny, this portion of instruction seven, which allowed the jury to find a liberty interest in reputation alone, is simply wrong, and while unobjected to by defense counsel, constitutes plain error.

The court acknowledges *Paul*'s holding, slip op. at 31, but then relies on our discussion in *Miller v. City of*

Mission, 705 F.2d 368, 373 (10th Cir. 1983), to uphold the district court's instruction. Admittedly, instruction seven essentially tracks a portion of the language in *Miller*. That portion, however, must be read in view of the court's actual holding in the case, 705 F.2d at 373, in order to avoid a conflict with *Paul*, which is binding Supreme Court authority. Concerning the sufficiency of the evidence, we held that the record contained "ample evidence from which the jury could have concluded that the circumstances surrounding Miller's termination placed a stigma on him, *and* as a practical matter foreclosed other employment opportunities." *Id.* (emphasis added). *See also Walker v. United States*, 744 F.2d 67, 69 n.3 (10th Cir. 1984) (*Paul v. Davis* held that "a liberty interest was not infringed when the *only* loss suffered at the hands of the government is a 'stigma' or damage to reputation") (emphasis in original).

Recently, in *Wheeler v. John Deere Co.*, 862 F.2d 1404, 1412 n.5 (10th Cir. 1988), we directed the district courts to "cautiously and sparingly" charge the jury with appellate court dicta:

> "What an appellate Judge says for the Court does not mean that such language may, or should, be used as a jury charge. It all depends on whether, the words presumably chosen by one artificer [appellate judge] for others of presumed like skill [trial judge] communicate the applicable legal principles to those [jurors] attending, as it were, their-once-in-a-lifetime-law-school-for-a-day."

(quoting *United States Lines Co. v. Williams*, 365 F.2d 332, 335 (5th Cir. 1966)). In this case, the district court should have recognized that the isolated segment drawn from

Miller did not "communicate the applicable legal principles." To the extent *Miller* may be read as contrary to Supreme Court precedent, I am mindful of Judge Lamm's admonition of years ago: "To say that we proceed in the correction of errors nisi, upon the theory we commit none ourselves tickles the judicial fancy, but is quite untrue." *Donnell v. Wright*, 97 S.W. 928, 932 (Mo. 1906).

Moreover, the district court's failure to instruct the jury on the falsity requirement cannot be overlooked. *See* slip op. at 27. Falsity is a fundamental element of Melton's case which he did not prove. *See Codd v. Velger*, 429 U.S. 624, 627 (1977). Although the court noted that at trial defense counsel failed to timely object, that failure should be of no consequence in matters pertaining to well established legal principles which a plaintiff has the burden of proving before recovering a substantial damage award. *See Big Horn Coal Co. v. Commonwealth Edison Co.*, 852 F.2d 1259, 1266 (10th Cir. 1988) (plain error occurs where "substantial right" of party is affected).

Lastly, even if I were to agree that Melton was deprived of a liberty interest, the court's conclusion that he was entitled to a name-clearing hearing complete with the right to confront and cross-examine witnesses before an administrative review board finds no support in precedent. *See* slip op. at 25-27. "Due process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). "In general, something less than a full evidentiary hearing is sufficient prior to adverse administrative action." *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 545 (1985). Balancing Melton's interest in a good name, the police department's interest in discharging

employee's guilty of misconduct, the avoidance of overwhelming administrative burdens, and the risk of a mistaken termination as required by *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), a trial-type proceeding on a charge which was not even the reason for Melton's release, is unwarranted. The police department's public retraction of the perjury charge indicating that no evidence existed to suggest Melton was guilty of perjury might well be sufficient. But at most, Melton was entitled to written notice of the perjury charge, an explanation of the evidence and an opportunity to present his side of the story. *Koerpel v. Heckler*, 797 F.2d 858, 868-69 (10th Cir. 1986). *See also Rosewitz v. Latting*, 689 F.2d 175, 177 (10th Cir. 1982) ("The City . . . has an important interest in efficient functioning of the city machinery which may be impeded by imposing a requirement of adversarial, trial-like hearings for every discharged employee").

IV.

In view of my legal conclusion that Melton's discharge was based upon his constitutionally protected disclosure to Judge Page's defense counsel of the recorded conversation between himself and the government, the court property reaches and decides the questions of municipal liability and qualified immunity as they pertain to the disclosure issue. Because the Oklahoma City Charter makes the City Manager ultimately responsible for the dismissal of city employees, and the manager approved the Disciplinary Review Board's decision to terminate Melton, rec. vol. XII, at 935, 938, Melton's discharge surely constitutes an act of official municipal policy for which municipal liability may be imposed under

the reasoning of *Pembaur v. Cincinnati*, 475 U.S. 469, 480-81 (1986) (if decision to follow particular course of action is made by government's authorized decision-makers, it represents an act of official policy regardless of how many times the action is taken). But because the individual defendants' actions at the time of the incident were not proscribed by "clearly established law" of which reasonable officials would be aware, the court properly concludes that the principles of *Harlow v. Fitzgerald*, 457 U.S. 800, 815-19 (1982), preclude their liability. Slip op. at 49.

Conclusion

Contrary to the court's approach, I would grant judgment as a matter of law in favor of all the defendants on Melton's claim that he was deprived of property and liberty without due process of law, as well as on the claim that his discharge was based upon his trial testimony for Judge Page in violation of the first amendment. I would grant qualified immunity to the individual defendants on Melton's remaining first amendment claim surrounding disclosure of the tape recording, but remand for a new trial on the issue of damages to be assessed against the City of Oklahoma City for discharging Melton for an impermissible reason; namely, disclosure of a tape recording protected by the first amendment.

Accordingly, I concur in part and dissent in part.